TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~125~~ 126.

FRANCIS WINSLOW, AUGUSTUS JAY, AND THE AMERICAN SECURITY AND TRUST COMPANY, SUBSTITUTED TRUSTEES UNDER THE WILL OF CATHERINE PEARSON, DECEASED, APPELLANTS,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 30, 1902.

(18,212)

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FRANCIS WINSLOW, AUGUSTUS JAY, AND THE AMERICAN SECURITY AND TRUST COMPANY, SUBSTITUTED TRUSTEES UNDER THE WILL OF CATHERINE PEARSON, DECEASED, APPELLANTS,

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1 In the Court of Appeals of the District of Columbia.

THE BALTIMORE AND OHIO RAILROAD CO., Appellant,
vs.
FRANCIS WINSLOW ET AL. } No. 1087.

Supreme Court of the District of Columbia.

THE BALTIMORE AND OHIO RAILROAD Company
vs.
FRANCIS WINSLOW, AUGUSTUS JAY, and The American Security and Trust Company, Substituted Trustees under the Will of Catharine Pearson, Deceased. } No. 21764. In Equity.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Bill of Complaint.

Filed October 4, 1900. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

THE BALTIMOEE AND OHIO RAILROAD Company
vs.
FRANCIS WINSLOW, AUGUSTUS JAY, and THE American Security and Trust Company, Substituted Trustees under the Will of Catherine Pearson, Deceased. } Equity. No. 21764, Dock. 49.

To the honorable the supreme court of the District of Columbia, sitting as a court of equity:

Your complainant states as follows:

First. That it is a body corporate, having an office and doing business in the District of Columbia.

Second. That the defendants Francis Winslow and Augustus Jay, are citizens of the United States, the former being a sometime
2 resident of the District of Columbia and the latter a citizen and resident of the State of New York, and the defendant The American Security and Trust Company is a corporation duly incorporated in and for the District of Columbia, authorized by its charter to act as trustee, and has its office and is doing business in the District of Columbia, and all of said defendants are sued as substituted trustees under the last will of Catherine Pearson, deceased.

Third. That in 1871 and 1872, when its Metropolitan branch was being constructed within the District of Columbia by The Baltimore and Ohio Railroad Company, this complainant, negotiations were entered upon by and between said company and Carlisle P. Patterson, William H. Philip, and Walter S. Cox, the original trustees under the will of Catherine Pearson, deceased, for the purchase of lots numbered nine (9), ten (10), eleven (11), and twelve (12), in square numbered seven hundred and ten (710), the said described lots belonging to the estate of said Catherine Pearson, and their possession being useful to said company in the construction of the said Metropolitan branch. The terms of purchase had been agreed upon when it was discovered that by reason of some defect in title or want of power in the trustees the said trustees were unable to make a valid conveyance and transfer of said property, and thereupon it was agreed that the said trustees should lease to said company the said lots for the term of five years, and should pay therefor the sum of $755.00 *per* annum, and that at any time during the term aforesaid, on payment to the trustees by said complainant of the sum of $12,592.00, which was the price agreed upon when the sale of said lots was contemplated, the trustees would convey the premises aforesaid to this complainant, its successors and assigns, by a good and sufficient deed in fee-simple, with all the title and estate therein of the said parties of the first part; and, further, that at or before the expiration of the term aforesaid, on the request of this complainant, its successors and assigns, the trustees would renew said lease with the same agreements and privileges as therein contained for another term of five years, or until such time as said trustees should be prepared to convey the said premises as agreed upon, with a perfect title in fee-simple thereto, and in case this complainant should omit to make said request at or before the expiration of said term the said trustees were required to notify said complainant of the expiration of said term; and to require it to exercise its election to renew said lease, and the privilege to renew, as aforesaid, should continue for three months after such notice, all of which is fully contained and set forth in the lease entered into and executed by said trustees and this complainant on the first day of August, 1872, a copy of which is filed herewith, marked "Complainant's Exhibit No. 1," and is prayed to be read and considered as a part of this bill.

Fourth. That while at the expiration of the lease referred to no formal renewal was made, yet the said lease was in fact renewed by the understanding and consent of the parties and by the acceptance on the part of the trustees of the rent according to the condi-
3 tions of said lease, and this arrangement and understanding was continued until the first day of February, 1883, when said lease was extended by a formal agreement of letting for the full term of five years from the first day of August, 1883, and containing all the terms and provisions of said original lease of August first, 1872, this said last-mentioned lease being executed by Walter S. Cox and by Augustus Jay and Francis Winslow, trustees, the two last named being substituted in the places of Carlisle P. Patterson and William H. Philip, then deceased or retired, and Eliza W.

Patterson, beneficiary under the will of Catherine Pearson, deceased, and the Baltimore and Ohio Railroad Company. A copy of said lease is herewith filed, marked "Complainant's Exhibit No. 2," and is prayed to be read and considered as a part hereof.

Fifth. That after the expiration of the term contained in the last-mentioned lease of 1883 the lease of said described property was renewed and continued in existence by the understanding and agreement of parties, by the acceptance and continuance of the provisions of said lease, and was admitted and acknowledged in communications from said trustees to this complainant.

Sixth. That on the seventh day of August, in the year 1892, after communications with the agents of the trustees, and as far as possible with the trustees, a renewal of said lease was prepared and was executed by Francis Winslow on the 17th day of October, 1892, at which time it was discovered that Walter S. Cox had by resignation ceased to be a trustee, and that Augustus Jay, the third trustee, was absent in Europe. This lease contained the same provisions of the before-mentioned leases, and was delivered to the Baltimore and Ohio Railroad Company on November 30, 1892, a copy of which, marked "Complainant's Exhibit No. 3," is filed herewith and is prayed to be read and considered as a part hereof. Under this last-mentioned lease the rents were regularly paid by the complainant and received by the trustees, and all of its provisions acted upon and fully acknowledged and lived up to by the parties.

Seventh. That at the expiration of the term named in the last-mentioned lease the complainant notified the trustees by notices addressed to them and sent care Thomas J. Fisher and Company, their agents at Washington, of its desire to renew the lease for the further term of five years. A copy of said notice is herewith filed, marked "Complainant's Exhibit No. 4," and is prayed to be taken and read as a part of this bill. A proper form of lease for said additional term was accordingly prepared by said company and forwarded to the agents of the trustees for execution by them. In reply to this notice of the company of its desire to renew said lease, which was forwarded to Mr. Winslow, trustee, the company received the following notification, to wit:

"The Baltimore and Ohio Railroad Company.

GENTLEMEN: In reply to your letter in relation to the lease of lots in square 710, this city, I beg to say that we are now prepared
4 to convey a good title, and prefer executing such conveyance to a renewal of the lease.

Very truly yours,

(Signed) FRANCIS WINSLOW."

And accompanying that notification was a letter from Mr. Winslow, dated September 27, 1897, addressed to M. J. Colbert, of the firm of Hamilton and Colbert, attorneys for the complainant, as follows:

"MATTAPOISETT, MASS., *Sept.* 27, 1897.

M. J. Colbert, Esq., Washington, D. C.

DEAR MR. COLBERT: I return the copy of the lease to the B. & O. R. R., which I would have sent to you before this had I not hoped an earlier return to Washington than I now expect would enable me to transact the business in person.

My understanding is that originally the R. R. Co., wishing to purchase the property, could not do so on account of some deficiency in the title. The immediate use of the property being necessary, a lease was made, but in such form as would compel the transfer of the lots at the price agreed whenever a clear title could be given. Pending the transfer, the R. R. Co. was to pay 6 % on the deferred payment.

The renewal of the lease has always been under the same reciprocal conditions and obligations, and I do not feel authorized to change them; but I suggest, as we are now able to furnish a satisfactory title, the present as a suitable time to transfer the property. I enclose a more formal notice in reply to a letter received from the railroad authorities.

Sincerely yours,

(Signed) FRANCIS WINSLOW."

A copy of said letter is herewith filed, marked "Complainant's Exhibit No. 5," and is prayed to be taken and read as a part of this bill.

Eighth. That the rent under said leases was paid by the complainant every six months—August and February; that when the rent for the six months from the first of August, 1897, to February first, 1898, became due a voucher therefor, made payable to Francis Winslow, trustee of Eliza W. Patterson, was sent to Mr. Winslow, care of Fisher and Company, agents; that at this time Mr. Winslow was absent in Nicaragua as a member of the canal commission and the voucher was sent to Mrs. Eliza W. Patterson, who, under the terms of the will of Catherine Pearson, was the recipient of the rents from this property. Mrs. Patterson returned said voucher to the company, requesting that one should be made out payable to herself and Judge Cox and the other trustees, as had been done, according to her letter, for many years, in order that she might be able to obtain the money thereon. A copy of this letter, marked "Complainant's Exhibit No. 6," is filed herewith, and is
5 prayed to be read and considered as a part of this bill. The complainant declined to do this, but upon arrangement between Mrs. Patterson and Thomas J. Fisher and Company, agents of said trustees, the voucher to Francis Winslow, above referred to, was endorsed "Francis Winslow, trustee, by Thomas J. Fisher and Company, attorneys," and on this endorsement the money on said voucher was obtained. When the next instalment of rent was due, in August, 1898, Mr. Winslow declined to negotiate the voucher for rents, claiming that the rights of the company had been terminated by his notice in September of 1897, hereinbefore set forth, and that since that time the company had been occupying the property as

tenants by sufferance. This contention on the part of Mr. Winslow, acting for the trustees, was denied by this complainant, which insisted that in 1897 there was a renewal of the lease which carried with it and continued the right of the company to purchase under the terms thereof; that the notice of September 27, 1897, given by Mr. Winslow was not sufficient in form and contained no definite declination to renew, but simply asserted a readiness to convey and a preference to sell rather than renew the lease; and, further, that the action of the parties and the receipt of the rent by Mrs. Patterson in February, 1898, and the endorsement of the check for said rent by Fisher and Company, agents of Winslow, was a distinct renewal of said lease. That and the succeeding vouchers forwarded as usual to Mr. Winslow, trustee, and made payable to his order, were retained until January 5, 1900, when they were returned to the company and a check given for the aggregate amount thereof under an agreement that the payment of said amount and its acceptance should be without prejudice to the rights of the respective parties and their claims relating to the lease of said land, or the renewal of said lease, or any question or matter connected therewith. The said agreement is contained in a receipt given to the Baltimore and Ohio Railroad Company by Messrs. Carlisle and Johnson, attorneys for the trustees, dated January 5, 1900, a copy of which is herewith filed, marked "Complainant's Exhibit No. 7," and is prayed to be read and considered as a part hereof.

Ninth. That negotiations conducted on the understanding that the rights and claims of the respective parties should not be prejudiced were carried on for a settlement of the differences between said parties, but without success; and the company's position is fully set forth in a letter dated February 18, 1899, written by J. D. McCubbin, Jr., real-estate agent of the Baltimore and Ohio Railroad Company, to Francis Winslow, trustee, a copy of which is herewith filed, marked "Complainant's Exhibit No. 8," and is prayed to be read and taken as a part hereof.

Tenth. That on January 23, 1900, this complainant, by the said J. D. McCubbin, Jr., notified the trustees of the declination of their offer for the rent of the lots referred to at the rental of $1,500.00 per annum, made through Messrs. Carlisle and Johnson, and reiterated its right to purchase under the agreement for lease, and
6 offered to purchase the property in accordance with the terms of the lease, and to pay the sum named upon presentation of a proper deed. A copy of this communication, marked "Complainant's Exhibit No. 9," is filed herewith and is prayed to be read and considered as a part of this bill.

Eleventh. That on March ninth, 1900, the defendants Francis Winslow, Augustus Jay, and The American Security and Trust Company, substituted trustees under the will of Catharine Pearson, deceased, began suit against this complainant, The Baltimore and Ohio Railroad Company, before L. I. O'Neal, a justice of the peace, for possession of said lots for default in payment of rent, but by agreement judgment for the plaintiffs was taken on April 17, 1900, and the case appealed to the supreme court of the District of Colum-

bia, where it was properly docketed as suit at law No. 43895, and stands for trial on the appeal calendar for the October term of said court.

Twelfth. That on August 15, 1900, the said defendants, Francis Winslow, Augustus Jay, and The American Security and Trust Company, substituted trustees under the will of Catherine Pearson, deceased, brought suit against this complainant, The Baltimore and Ohio Railroad Company, in suit at law No. 44106, for the use and occupation of said described lots from the first day of August, 1897, to the sixteenth day of April, 1900, claiming $6,500.00, with interest from the 16th day of April, 1900.

Thirteenth. This complainant is advised and believes, and therefore avers, that by reason of their notice to the trustees of August 4, 1897, of its desire to renew the lease for the further term of five years, and of the action of said trustees with regard thereto, and of the receipt of the six months' rent in February of 1898 by the agent of said trustees, and of the failure of said trustees to return said rent when the action of their agent became known, that the complainant's rights under said lease have been preserved, and that the provisions of said lease are in force and effect, including the complainant's right to purchase said property at the price named therein; that this complainant is entitled to the specific performance of the agreements of the original lease and its several renewals to lease said property with the right of purchase, as therein provided.

Fourteenth. That the rights of this complainant cannot be determined and protected in the suits at law named in paragraphs eleven and twelve, and that it is just and equitable that the defendants should be enjoined and restrained from the prosecution of these suits and from the institution of any and all other proceedings by these defendants in regard to said property and its possession pending the determination of this cause and the rights of the parties in interest.

Wherefore, by reason of the premises, the complainant prays as follows.

First. That the United States writ of subpœna issue to each and all of the defendants hereto, commanding them and each of them to appear and answer the exigencies of this bill.

7 Second. That said defendants, trustees, as aforesaid, be decreed to convey to this complainant the lots described herein at the price and according to the terms of said lease of August first, 1872, and the several extensions or renewals thereof, and if necessary for such conveyance to execute a formal lease of said lots to this complainant for the term of five years from the first day of August, 1897.

Third. That a preliminary restraining order issue herein forthwith, to be served on each and all of the defendants, restraining them and each and all of them, their agents, attorneys, and servants, from prosecuting the suits at law referred to and entered respectively upon the dockets of the supreme court of the District of Columbia as suits numbered 43895 and 44106 until the final determination of this cause.

Fourth. That the suits at law hereinbefore referred to and entered

upon the docket of the supreme court of the District of Columbia as suits numbered 43895 and 44106 be stayed, and that the defendants and each and all of them and their agents, attorneys, and servants be perpetually enjoined from proceeding in or prosecuting said suits.

And that the complainant may have such other and further relief as may to the court seem just and right in the premises.

The defendants to this bill are Francis Winslow, Augustus Jay, and The American Security and Trust Company.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By J. D. McCUBBIN, Jr.,
Real-estate Agent.

HAMILTON & COLBERT,
Solicitors for Complainant.

I do solemnly swear that I have read the foregoing bill of complaint by me subscribed and know the contents thereof; that the matters and things therein stated on my personal knowledge are true, and the matters and things therein stated on information and belief I believe to be true.

J. D. McCUBBIN, Jr.

Subscribed and sworn to before me this 29th day of September, A. D. 1900.

GEO. W. HAULENBEEK,
[SEAL.] *Notary Public.*

Filed October 4, 1900. J. R. Young, Clerk.

"Complainant's Exhibit No. 1."

This agreement made this first day of August, in the year eighteen hundred and seventy-two, between Carlisle P. Patterson, William H. Philip and Walter S. Cox, trustees, of the first part and the Baltimore and Ohio Railroad Company, of the second part, witnesseth:

8 That the said parties of the first part, in consideration of the rents hereinafter reserved, do hereby demise, lease and to farm let, unto the said party of the second part, all those lots of ground in the city of Washington, in the District of Columbia, known as lots numbered nine (9), ten (10), eleven (11) and twelve (12) in square numbered seven hundred and ten (710), containing about forty-one thousand nine hundred and seventy-five square feet; to have and to hold to the said party of the second part, its successors and assigns for the full term of five years from the first day of August, instant, yielding and paying therefor yearly and for every year the sum of seven hundred and fifty-five $\frac{55}{100}$ dollars. And the said parties of the first part hereby agree to and with the said party of the second part, that at any time during the term aforesaid, on payment to them by said party of the second part of the sum of

twelve thousand five hundred and ninety-two dollars, they will convey the premises aforesaid to said party of the second part, its successors and assigns, by a good and sufficient deed in fee-simple, with all the title and estate therein of the said parties of the first part; and further that at or before the expiration of the term aforesaid, on the request of said party of the second part, its successors and assigns, they will renew this lease, with the same agreements and privileges as are herein contained for another term of five years or until such time as the said parties of the first part shall be prepared to convey the said premises as hereinbefore agreed, with a perfect title in fee-simple thereto; and in case said party of the second part shall omit to make said request, at or before the expiration of said term, the said party of the first part is required to notify said party of the second part of the expiration of said term and require it to exercise its election to renew said lease, and the privilege of renewing the same as aforesaid shall continue for three months after such notice.

In testimony whereof said parties of the first part have hereto set their hands, and the president of said company has here- affixed his signature on the first day of August, 1872.

(Signed in duplicate) C. P. PATTERSON,
WILLIAM H. PHILIP,
WALTER S. COX,
Trustees of Cath. C. Pearson's Will.
THE BALTIMORE AND OHIO RAILROAD COMPANY,
By JOHN W. GARRETT, *President.*

"COMPLAINANT'S EXHIBIT No. 2."

This agreement made this first day of February in the year eighteen hundred and eighty-three between Walter S. Cox, Augustus Jay, Francis Winslow and Eliza W. Patterson, of the first part and the Baltimore and Ohio Railroad Company of the second part, witnesseth: That the said parties of the first part in
9 consideration of the rents hereinafter reserved do hereby demise lease and to farm let unto the said party of the second part all those lots of ground in the city of Washington in the District of Columbia, known as lots numbered nine (9), ten (10), eleven (11) and twelve (12), in square numbered seven hundred and ten (710) containing about forty-one thousand nine hundred and seventy-five square feet to have and to hold to the said party of the second part, its sucessors and assigns for the full term of five years from the first day of August instant yielding and paying therefor yearly and for every year the sum of seven hundred and fifty-five $\frac{55}{100}$ dollars ($755.55).

And the said parties of the first part hereby agree to and with the said party of the second part that at any time during the term aforesaid on payment to them by said party of the second part of the sum of twelve thousand five hundred and ninety-two dollars they will convey the premises aforesaid to said party of the second part its successors and assigns by a good and sufficient deed in fee-

simple with all the title and estate therein of the said parties of the first part and further that at or before the expiration of the term aforesaid at the request of said party of the second part its successors and assigns they will renew this lease with the same agreements and privileges as herein contained for another term of five years, or until such time as the said parties of the first part shall be prepared to convey the said premises as hereinbefore agreed with a perfect title in fee-simple thereto and in case said parties of the second part shall omit to make the said request, at or before the expiration of said term, the said party of the first part is required to notify said party of the second part of the expiration of said term and require it to exercise its election to renew said lease and the privilege of renewing the same as aforesaid shall continue for three months after such notice.

In testimony whereof said parties of the first part have hereto set their hands and the president of the said company has hereto affixed his signature on the first day of February, 1883.

WALTER S. COX,
AUGUSTUS JAY,
FRANCIS WINSLOW, *Trustees.*
ELIZA W. PATTERSON.
BALTIMORE AND OHIO
RAILROAD COMPANY,
By —— ——.

DISTRICT OF COLUMBIA, *City of Washington,* } *To wit:*

—— —— personally appeared before the undersigned, a justice of the peace in and for the city of Washington, this — day of ——, 1883, and acknowledged the same to be their act and deed.

—— ——, *J. P.*

10 "COMPLAINANT'S EXHIBIT No. 3."

This agreement, made this seventeenth day of October in the year eighteen hundred and ninety-two, between Walter S. Cox, Francis Winslow and Augustus Jay, trustees of Mrs. Eliza Patterson, of the first part, and the Baltimore and Ohio Railroad Company, of the second part,

Witnesseth, that the said parties of the first part in consideration of the rents hereinafter reserved do hereby demise, lease and to farm let unto the said party of the second part all those lots of ground in the city of Washington in the District of Columbia known as lots numbered nine (9), ten (10), eleven (11), and twelve (12), in square numbered seven hundred and ten (710) containing about forty-one thousand nine hundred and seventy-five square feet.

To have and to hold to the said party of the second part its successors and assigns for the full term of five years from the first day of August eighteen hundred and ninety-two, yielding and paying therefor yearly and for every year the sum of seven hundred and fifty-five $\frac{55}{100}$ dollars. And the said parties of the first part hereby agree to

and with the said party of the second part that at any time during the term aforesaid on payment to them by said party of the second part of the sum of twelve thousand five hundred and ninety-two dollars they will convey the premises aforesaid to said party of the second part, its successors and assigns, by a good and sufficient deed in fee-simple with all the title and estate therein of the said parties of the first part, and further, that at or before the expiration of the term aforesaid, at the request of said party of the second part, its successors and assigns, they will renew the lease with the same agreements and privileges as herein contained for another term of five years or until such time as the said parties of the first part shall be prepared to convey the said premises as hereinbefore agreed with the perfect title in fee-simple thereto, and in case said party of the second part shall omit to make said request at or before the expiration of said term the said party of the first part is required to notify said party of the second part of the expiration of said term and require it to exercise its election to renew said lease and the privilege of renewing the same as aforesaid shall continue for three months after such notice.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, and the party of the second part has caused its corporate name to be hereunto subscribed by Orland Smith, its vice-president, and its corporate seal to be hereunto affixed, on the day and year first above written.

FRANCIS WINSLOW,
Trustee. [SEAL.]

Witness:
HERMAN E. GASCH,
As to F. W.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By —— ——, *Vice-President.*

—— ——, *Secretary.*

11 "COMPLAINANT'S EXHIBIT No. 4."

BALTIMORE, MD., *August* 4, 1897.

Walter S. Cox, Francis Winslow, and Augustus Jay, trustees of Mrs. Eliza Patterson.

GENTLEMEN: I beg to notify you that the Baltimore and Ohio Railroad Company desires to renew for a further term of five (5) years the lease dated October 17th, 1892, between Walter S. Cox, Francis Winslow, and Augustus Jay, trustees of Mrs. Eliza Patterson, of the first part, and the Baltimore and Ohio Railroad Company, of the second part, of all those lots of ground in the city of Washington, District of Columbia, known as lots numbered nine, ten, eleven, and twelve, in square numbered seven hundred and ten.

Very truly yours,
(Signed) J. D. McCUBBIN, JR., *Agent.*

Original sent to Walter S. Cox, 1324 F St. N. W., Washington, D. C.

"COMPLAINANT'S EXHIBIT No. 5."

MATTAPOISETT, MASS., *Sept.* 27, 1897.

M. J. Colbert, Esq., Washington, D. C.

DEAR MR. COLBERT: I return the copy of the lease to the B. & O. R. R., which I would have sent to you before this had I not hoped an earlier return to Washington than I now expect would enable me to transact the business in person.

My understanding is that originally the R. R. Co., wishing to purchase the property, could not do so on account of some deficiency in the title. The immediate use of the property being necessary, a lease was made, but in such form as would compel the transfer of the lots at the price agreed whenever a clear title could be given. Pending the transfer, the R. R. Co. was to pay 6 % on the deferred payment.

The renewal of the lease has always been under the same reciprocal conditions and obligations, and I do not feel authorized to change them, but I suggest, as we are now able to furnish a satisfactory title, the present as a suitable time to transfer the property. I enclose a more formal notice in reply to a letter received from the railroad authorities.

Sincerely yours,

(Signed) FRANCIS WINSLOW.

"COMPLAINANT'S EXHIBIT No. 6."

WASHINGTON, 1321 18TH ST., *Jan'y* 31*st*, 1898.

Mr. Ijams, treasurer of the B. & O. Railroad Co.

DEAR SIR: I received this morning your check for the rent due me for my property on 1st St., east of the Baltimore and Ohio
12 Railroad Company. The check is made out to Mr. Francis Winslow, trustee; he is at present in Nicaragua as a member of the canal commission. I cannot have this check cashed without his signature, which I cannot get without sending the check to Nicaragua. To do so would be a great risk of having it lost. I will, therefore, request you to make it out to me or to Cox, Jay, and Winslow, as you have done for many years. Judge Cox and Mr. Augustus Jay are both here and getatable, and they will sign the check as they have done for years. I will inform Mr. Winslow of this and hope there will be no delay in returning the check to me properly endorsed. I remain yours truly obliged,

ELIZA W. PATTERSON.

"COMPLAINANT'S EXHIBIT No. 7."

WASHINGTON, D. C., *January* 5, 1900.

Received from the Baltimore and Ohio Railroad Company check dated December 26th, 1899, for $1,133.31, on account of rents on lots 9, 10, 11, and 12, in square 710, Washington, D. C., the said

payment being made and received without waiver of or prejudice to the claims of either the Baltimore and Ohio Railroad Company or said Francis Winslow, trustee, relating to the lease of said lots or the renewal of said lease, or any question or matter connected therewith.

(Signed) CARLISLE & JOHNSON,
Att'ys for Trustee.

"COMPLAINANT'S EXHIBIT NO. 8."

FEBRUARY 18TH, 1899.

Francis Winslow, Esq., New Milford, Conn.

DEAR SIR: I have received your letter of the 15th instant and have referred the question to our law department. They advise me, as I have before written you, that we have the right to purchase under terms of the lease, basing that opinion upon the form of your notice to the railroad company of September 27th, 1897. In that notice you do not definitely decline to renew, but say that you are prepared to convey, and prefer executing such a conveyance to a renewal of the lease.

Our law department thinks that in order to terminate the lease and put the company to its election to purchase or not that your demand must be a distinct refusal to renew. Especially is this true in view of the long continuance of the lease. The acceptance of rent after the notice, they think, would also operate as a waiver of the notice. Although the rent was not paid directly to you or to your agent with your knowledge, you being away at the time, yet the rent was finally received by you, and they think that, to avoid a waiver of the notice by acceptance of rent, it would have been necessary for you, immediately upon learning that the rent had been paid to your agent, to return it.

13 I appreciate, however, your kindness in not desiring to have any controversy over this matter, and think that we can adjust it without the aid of the court.

In your letter of January 25th you express a willingness to assist, as far as your influence goes, in making a lease or purchase if the road prefers, and in your letter of February 15th you think you would prefer to sell rather than lease, but would be governed, either in a sale or lease, by what you regard as present value. Without waiving in any way the right, which I am advised the company has to purchase the property under the terms of the old lease, I would be glad to receive from you a proposition to lease for such term as you may think best, say two to five years.

The present status of the company makes it a little troublesome to purchase property at this time, and therefore we would prefer a proposition to lease. This, I understand, you are willing to do, if we can agree upon a rental. I do not think our law department would consent to entertain a proposition to purchase, except upon the terms contained in the old lease, as they seem to be very confident as to the correctness of their position in regard to it, but to

avoid any controversy at this time I would be willing to take up the question of the amount of rental based, not upon the old lease, but upon the present value of the property.

Very truly yours, J. D. McCUBBIN, Jr.

"Complainant's Exhibit No. 9."

Copy.

Baltimore, Md., *January* 23, 1900.

Subject: Leasing certain lots in Washington, D. C., and as to sale of same.

Walter S. Cox, Francis Winslow, and August Jay, trustees of Mrs. Eliza Patterson.

Gentlemen: There has been submitted to this company through Messrs. Carlisle and Johnson, your attorneys, an offer to lease lots 9, 10, 11, and 12, in square No. 710, Washington, D. C., for a term of six years, at a rental of $1,500.00.

This company is advised that, under the agreement for the lease and purchase of said lots, it has the right to purchase said lots for $12,592. This company has always been ready to purchase the lots since the time it was first informed that the trustees were in a position to convey a good title, and so notified Mr. Winslow, at the same time stating to him that it would prefer to continue the existing arrangement. Negotiations as to the amount of rent which the company would be willing to pay were carried on for some time; during all of which time this company held the position that it has the right and was ready to purchase the property. A formal tender of the money would have been made had not Mr. Winslow notified the company that the trustees would not make the sale. The
14 company now renews its offer to purchase the property in accordance with the terms of the lease, and is ready to pay the money upon the presentation of a proper deed.

The company declines the offer submitted through Messrs. Carlisle and Johnson to lease at a rental of $1,500, and renews its offer made through its counsel, Messrs. Hamilton & Colbert, to lease for $1,000 a year for such time as it may require the property, if you prefer to make a lease at that rate rather — to sell at the price named in the lease.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By J. D. McCUBBIN, Jr., *Real-estate Agent.*

Restraining Order, upon the Complainant Filing Undertaking as Required by Equity Rule 42.

The defendants are hereby restrained as prayed in the within-mentioned bill until further order, to be made, if at all, after a hear-

ing, which is fixed for the 15th day of October, 1900, of which take notice.

By the court:

JOB BARNARD, *Justice.*

Oct. 4th, 1900.

Service accepted for defendants Winslow & Jay.

CARLISLE & JOHNSON,
Att'ys for said Defendants.

Answer of Defendants.

Filed Oct. 15, 1900.

In the Supreme Court of the District of Columbia.

THE BALTIMORE AND OHIO RAILROAD Company
vs.
FRANCIS WINSLOW ET AL. } No. 21764. In Equity.

The joint and separate answer of the defendants, Francis Winslow, Augustus Jay, and The American Security and Trust Company, substituted trustees under the will of Catharine Pearson, deceased, to the bill of complaint of the Baltimore and Ohio Railroad Company against them in chancery exhibited.

These defendants, now and at all times reserving all right of objection and exception to the many imperfections, errors, irregularities, and deficiencies in the said bill, for answer thereto or to so much thereof as they are advised it is material and necessary for them to answer, answering, say:

1 and 2. Answering the first and second paragraphs of said bill, they admit the averments thereof to be true.

15 3. Answering the third paragraph of said bill, these defendants say they have no knowledge, information, or belief as to any negotiations between the complainant and these defendants' predecessors in this trust, Patterson, Philip, and Cox, having for their object the purchase of lots numbered nine (9), ten (10), eleven (11), and twelve (12), in square numbered seven hundred and ten (710), in the years 1871 and 1872, but upon information and belief they admit that the said Patterson, Philip, and Cox, in their capacity as trustees under the will of one Catharine Pearson, deceased, did execute certain agreement of lease, the terms of which, defendants are informed and believe, were as stated in said third paragraph, and of which they believe Complainant's Exhibit No. 1 to be a correct copy; but they are advised and believe, and therefore charge, that the said agreement was void as an agreement to sell the land therein referred to, because the said trustees were without any authority to sell or to agree to sell the same.

4. Answering the fourth paragraph of said bill, these defendants say that they have no knowledge or information as to the allegations

therein contained as to the understanding or agreement of the complainant and the then trustees under the will of Catharine Pearson prior to the first day of February, 1883, and if material they demand strict proof thereof. Upon information and belief they admit that an agreement of lease of the terms stated in said paragraph was executed by the trustees, as there stated, and upon information and belief they admit that Complainant's Exhibit No. 2 is a correct copy thereof, from which it appears that the complainant did not execute the same, but they deny that the same was a valid agreement to sell said real estate, as the trustees were not authorized, as required by the will of Catharine Pearson, to sell or to agree to sell the said real estate.

5. Answering the fifth paragraph of said bill, these defendants say that they deny the averments therein contained and aver the fact to be that on the thirtieth day of January, 1888, the complainant and the then trustees under the will of Catharine Pearson, namely, Walter S. Cox, Francis Winslow, and Augustus Jay, entered into a formal agreement of lease for said land, a copy of which is filed herewith, marked Defendants' Exhibit No. 1, and prayed to be read as a part of this answer, the original whereof is in the possession of these defendants and will be produced at the hearing. These defendants deny that the said agreement was a valid agreement of sale of said land, and deny that the trustees had any authority under the said will to make any sale or agreement to sell the same, because they aver the fact to be that the said real estate was devised to the trustees by the residuary clause of the will of Catharine Pearson, which is in the following terms, to wit:

"Seventhly. All the rest and residue of my estate real and personal wheresoever situated I give and devise to Carlile P. Patterson, William H. Philip & Walter S. Cox or the survivors & survivor of them to be by them held as trustees for the sole and separate use of my dear daughter Eliza Patterson during the term of her
16 natural life & so that the same shall not be liable for the debts or subject to the control contracts or engagements of her present or any after taken husband; to permit her by herself, or her special attorney appointed in writing to be signed by her to receive the annual income & profits of the same for her own sole and separate use, her receipt or that of her attorney so appointed as aforesaid alone to be an acquittance to the person or persons charged with the payment of such income or any part of the same & to the extent only therein expressed to have been paid; and if she please to occupy possess and use for her own account accommodation & convenience & that of her family any part of the property real and personal so held for her separate use & benefit she shall be allowed to do so; and if at any time the said Eliza Patterson shall in writing to be signed by her in the presence of & to be attested by a subscribing witness desire the said Carlile P. Patterson, William H. Philip and Walter S. Cox or the survivors & survivor of them to sell any part of the estate real & personal held by them for her separate use, for the purpose of changing the investment thereof, it shall be lawful for the said named trustees or the survivors or survivor of them

to sell the same for such purpose only & to transfer and convey the absolute estate in fee therein, to the purchaser thereof; to receive the proceeds of any & every such sale of the purchaser who shall not be required to see to the application thereof; & to invest the same in such manner as the said Eliza W. Patterson may require; and such new investment shall be held by the said trustees for the same use trusts & purposes & with the same powers & authority of sale and reinvestment as is herein declared of & concerning the original trust subject & separate estate.

And after the death of the said Eliza W. Patterson the said named trustees & their successors shall hold the said trust subject & separate estate—original and subsequently acquired by sale and reinvestment—for the use & benefit of any child, or children, of the said Eliza W. Patterson & the issue of any child or children of the said Eliza who may die leaving issue in the lifetime of the said Eliza; and such issue shall take the share or portion of the said estate which their parent or parents would have taken had they survived the said Eliza. And if the said Eliza W. Patterson shall die without leaving a child or children, or issue of any child or children, living at the time of her death, the said trustees and their successors shall hold the said trust subject and separate estate for my right heirs. And if it shall happen that either of the said trustees shall die, or become incapable of acting, or shall refuse to act in the execution of said trusts, then & in every such case, the continuing trustees or trustee shall from time to time nominate some other person or persons to be approved by the said Eliza W. Patterson to be trustee or trustees in the place & stead of the person or persons so dying, or becoming incapable or refusing to act and shall convey & settle the said trust subject & separate estate in such manner, that the same shall be legally vested in such continuing trustees or trustee and such person or persons so named & appointed to that
17 office for the same uses trusts & *pur*poses & with the same power & authority of administration sale & reinvestment as is hereinbefore declared of & concerning the said trusts subject & estate and the said new trustee or trustees shall have the same power to act in the premises in conjunction with the continuing trustee or trustees and as survivors of them, as if they had been originally named trustee or trustees in the premises in this my last will and testament."

And these defendants say that the said Eliza W. Patterson did not, in writing signed by her in the presence of and attested by a subscribing witness, or by any writing, desire the trustees to sell said real estate or agree to sell the same, and the said trustees were therefore without power and authority to sell or to agree to sell said land or any part thereof. A duly certified copy of said will of Catharine Pearson is herewith filed, marked Defendants' Exhibit No. 2, and prayed to be taken and read as part hereof.

6. Answering the sixth paragra-h of the bill, these defendants say that it is untrue that there were any communications with the agents of the trustees in or about August, 1892, because the trustees had never appointed any agent or agents authorized to act for them in

respect of the leasing of said land or the renewal of any such lease. It is true that an instrument in writing, of which Complainant's Exhibit No. 3 is a copy, was prepared in duplicate and sent to the defendant Winslow in care of Thomas J. Fisher and Co., real-estate brokers, who were the real-estate agents of the trustees for other property not embraced in these proceedings, and that the same were signed by the defendant Winslow. It is true that the said Walter S. Cox had, before that time, ceased to be a trustee by virtue of a decree of this court relieving him from the office passed on the thirtieth day of June, 1892, a copy of which decree is herewith filed, marked Defendants' Exhibit No. 3, and prayed to be taken and read as part hereof, but the defendant Jay was and continued to be trustee and never signed said written instrument; that the said written instrument signed in duplicate by the defendant Winslow were sent to the complainant on or about November 30th, 1892, and were both retained in its possession until on or about the — day of November, A. D. 1898, when upon request of said Winslow they were exhibited to him, and one of them delivered to him by the complainant, but neither of them was signed or in any manner executed by the complainant, as appears by the duplicate original in possession of defendants, and by the Complainant's Exhibit No. 3, which is a copy of the other duplicate original.

It is true that from August, 1892, until August, 1897, the complainant retained possession of the real estate herein described and paid rent at the rate mentioned in said unexecuted paper, which rent was received by the trustees, but these defendants deny that all or any of the provisions of said paper were acknowledged or lived up to by the parties save the continuance of possession and the payment of rent by the complainant.

18 And these defendants say that the said instrument of writing dated October 17th, 1892, of which Complainant's Exhibit No. 3 is a copy, is wholly void because never executed by the trustees or the complainant, because the provision for further renewal therein contained was not required by the terms of the lease of January 30th, 1888, the last agreement of the parties, and was not assented to by the trustees, one of whom, the defendant Jay, never saw said paper dated October 17th, 1892, and the provision for a sale to the complainant was *ultra vires*, being beyond the powers of the trustees, under the terms of the will creating them trustees, by which no sale or agreement for sale could be made by the trustees without the direction in writing of the said Eliza W. Patterson, signed by her in the presence of and attested by a subscribing witness, whereof the complainant had due notice, having dealt with the trustees always as trustees under the duly probated and recorded will containing the limitation upon their powers aforesaid, and the said Eliza W. Patterson never did direct or consent, in writing or otherwise, the said agreement to sell to the complainant in the said instrument of writing contained.

7. Answering the seventh paragraph of said bill, these defendants say that it is true that on or about the fourth day of August, A. D. 1897, the complainant addressed to the trustees Winslow and Jay

and to Walter S. Cox, who for more than five years had ceased to be a trustee, a letter of which Complainant's Exhibit No. 4 is a copy, which was sent in care of Thomas J. Fisher and Co., but these defendants deny that said Thomas J. Fisher and Co. were then or ever had been the agents of the trustees in relation to the leasing of said premises, but these defendants admit that said letter was forwarded to the defendant Winslow by said Thomas J. Fisher and Co. Thereafter the defendant Winslow, being in Massachusetts and not having any papers in his possession relating to the matter, wrote to the attorneys of the complainant for a copy of the lease, and on the 25th of August, 1897, the attorneys of the complainant sent to the defendant Winslow a copy of the lease prepared in 1892. On the 27th of September, 1897, the defendant Winslow wrote to M. J. Colbert, Esq., of counsel for complainant, the letter set out in the seventh paragraph of the bill enclosing a letter of the same date to the complainant, which is in substance set out in said paragraph without date and which is as follows:

"WASHINGTON, D. C., *September* 27, 1897.

To the Baltimore and Ohio R. R. Co., Baltimore, Md.

GENTLEMEN: In reply to your letter in relation to the renewal of the lease of the lots in square 710 of this city, I beg to say that we are now prepared to convey the property with a perfect title and prefer executing such conveyance to renewal of the lease.

Very truly yours, FRANCIS WINSLOW, *Trustee*."

These defendants deny that a proper form of lease was prepared by complainant and sent to the trustees, but, on the contrary,
19 aver that the lease was very materially different in terms from the last preceding one executed by the parties or the one of October 17th, 1892, which had not been executed, and provided for a conveyance to the Real Estate and Improvement Company of Baltimore City, but this lease was never executed by any of the parties. A copy of this lease is herewith filed, marked Defendants' Exhibit No. 4, and prayed to be taken and read as a part hereof. That at the time of the communications in the seventh paragraph of the bill referred to the defendant Winslow did not have access to the papers relating to the agreements between the parties, his cotrustee was in Europe, and he was without means of consulting his cotrustee or with counsel as to his powers and duties in the premises. But these defendants are advised and believe, and therefore aver, that by the terms of the lease executed by all parties in January, 1888, the complainant was entitled to a single renewal without any agreement for a further renewal and without any privilege of purchase, since the original privilege of purchase of January 30th, 1888, was *ultra vires* and void, of which fact the complainant had full notice, and that when the term limited in the unexecuted lease of October 17th, 1892, had expired the complainant had received and enjoyed all the rights and privileges to which, under the executed lease of January 30th, 1888, it had any legal or equitable right, and that prior to January, 1899, the defendant Winslow

informed the complainant that all its rights were at an end and that a new agreement upon a new basis must be made.

8. Answering the eighth paragraph of said bill, these defendants say it is true that for some time prior to August, 1897, the complainant had paid rent in semi-annual instalments in February and August, which payments were in the forms of orders to pay money by one officer of the complainant upon another of its officers. Upon information and belief they admit that after the defendant Winslow had refused to execute a new lease and had denied the right set up by the complainant the complainant on or about February 1st, 1898, sent one of these orders for rent from August, 1897, to January, 1898, to the trustees, in care of Thomas J. Fisher and Co., but they deny that said Fisher and Co. were the agents of the trustees. It is true that at that time the defendant Winslow was absent in Nicaragua as a member of the canal commission, and upon information and belief they admit that the order for said money was sent to their *cestui que trust*, Eliza W. Patterson, and they admit upon information and belief that Mrs. Patterson returned said order with the letter, a copy of which is marked Complainant's Exhibit No. 6. They admit upon information and belief that the said order was subsequently endorsed by Thomas J. Fisher and Co., as alleged, but they deny that said Thomas J. Fisher and Co. then had or ever had had any authority to endorse the name of said Winslow or of said Jay, either as trustees or personally, upon any check, draft, order, voucher, or other instrument for the payment of money or to sign the name of or bind either of them in any respect relating to their trusteeship or the business between said trustees and the complainant; and the endorsement alleged to have been made was wholly unauthorized by the defendant Winslow, Jay, or any other person having any authority from the trustees or either of them. It is true that, after the return to this country of the defendant Winslow, the defendant Winslow declined to negotiate the order for rent given in August, 1898, and claimed that the complainant's rights were at an end, but not, as alleged in said paragraph, by reason of his notice of September, but because the complainant's rights had expired by the fixed limitation of the contract creating them, and it is true that the agents of the complainant made the claims and contentions as to its alleged rights set out in said paragraph, all which claims and contentions were denied by said Winslow.

That it is true that the complainant sent to said Winslow in January, 1899, and August, 1899, orders issued by one of its officers upon another, directing the payment of money to the said Winslow, which were received by him, but the same were never presented for payment by said Winslow, but were returned to the complainant, and the complainant paid the amount thereof to the said Winslow under the conditions stipulated in the receipt of his counsel, a copy of which is filed as Complainant's Exhibit No. 7.

9. It is true that an attempt was made to effect an amicable settlement between the parties without result, and that the complainant's real-estate agent addressed to the defendant Winslow the letter, a copy of which is filed as Complainant's Exhibit No. 8, but these

defendants deny that said letter correctly sets forth the facts and deny that the contentions therein set up are sound or valid in law.

10. These defendants admit that the complainant, through its agent, addressed to the defendants Jay and Winslow and to Walter S. Cox, who for more than eight years had ceased to be a trustee, a letter, of which Complainant's Exhibit No. 9 is a copy, but they deny that said letter correctly states the facts, and they deny that the contentions therein made are sound in law.

11. Answering the eleventh paragraph of the bill, these defendants admit that they instituted suit for possession before Justice of the Peace O'Neil on the eighth of March, 1900 (and not on the ninth, as erroneously stated in said bill), and that judgment was rendered in favor of these defendants against the complainant. They deny that said suit was brought for failure to pay rent, although complainant had not paid rent, but the same was based upon a notice to quit, under the statute, given on the twenty-third of January, 1900, service of which was acknowledged on the 29th of January, 1900, by the counsel of the complainant. These defendants deny that judgment was rendered by agreement, but on the contrary, aver the fact to be that counsel for the complainant suffered judgment by default, informing counsel for the defendants that as an appeal would be taken in any event counsel for complainant did not care to try the case twice, and had therefore decided to suffer judgment by default and prosecute an appeal, which was accordingly taken by complainant on April 24th, 1900, and said appeal now stands on the trial calendar of this court for trial.

21 12. Answering the twelfth paragraph of said bill, these defendants admit the averments of fact therein contained to be substantially true.

13 and 14. Answering the thirteenth and fourteenth paragraphs of said bill, these defendants say that the same consist in assertions of matters of law, to which they are advised no other or further answer is required of them than that they deny the correctness of the propositions therein contained, and aver that the complainant has no rights whatsoever in the premises.

Further answering said bill, these defendants say that no agreement in writing was entered into to sell to the complainant the real estate in these proceedings described, nor to lease the same to it for any period of time after the agreement of January 30th, 1888, and that by the express provisions of the statute of frauds the complainant cannot maintain its suit without such agreement in writing; and these defendants claim the same benefit and advantage of this defense as if they had specially pleaded the same or demurred to the bill for that reason.

These defendants also say that they and each of them are and at all times were wholly without any authority to make any sale or agreement to sell any part of the real estate devised by the will of Catharine Pearson, deceased, without an express direction in writing so to do from Eliza W. Patterson, signed by her in the presence of and attested by a subscribing witness, of which the complainant had

full notice, and that no such authority was ever given by the said Eliza W. Patterson.

And these defendants further say that they have no beneficial interest or estate in the said real estate, but are merely trustees, and have no right or power to dispose of the same in the absence of proper direction and authority from the beneficiary of their trust.

Further answering said bill, these defendants say that by the terms of the agreement dated the 30th of January, 1888, which was duly executed by all of the trustees under the will of Catharine Pearson and by the complainant, it was provided, among other things, that at or before the expiration of the term of five years in that instrument granted, at the request of the complainant, the trustees would renew the lease, with the same agreements and privileges as were in that lease contained, for another term of five years; but these defendants are advised and believe, and therefore aver, that as matter of law that provision in the said agreement did not require them to give, nor entitle the complainant to receive, in such new lease, an agreement for another renewal, and that the utmost right of the complainant under the agreement of January 30th, 1888, was for a demise of the premises for a period of ten years and no longer, and that the complainant has had possession of said premises for more than thirteen years; and these defendants further say that though the said lease of the 30th of January, 1888, contained a privilege to the complainant to purchase said land, said privilege was *ultra vires* and void, because the trustees under the will had no authority to grant the same, but furthermore

22 these defendants show that the said privilege of purchase was limited to the case of the complainant's paying to the trustees, during the term of the lease, the sum of twelve thousand five hundred and ninety-two dollars; that the said complainant did not, during the term of five years demised by said lease, nor during the succeeding term of five years, pay the said sum, nor tender to the trustees the money, nor offer or agree to purchase the land, and that even had the said privilege of purchase been valid and had it been renewed in any subsequent agreement, which these defendants deny, the complainant never having availed itself of the privilege, is not entitled now to do so.

And these defendants further show that the complainant, through its agent, on two occasions before the filing of this bill, declared itself unwilling and unable to purchase said property, and stated that it was without the necessary funds therefor.

These defendants further show that the complainant is not entitled to have specific performance of the alleged agreement of lease and sale, because the said pretended contract lacks mutuality, in that the complainant, by the terms of the said alleged contract, was not bound to buy said land, nor to renew said lease, and the said complainant never having executed any agreement in writing after the expiration of the said agreement of January 30th, 1888, was not even suable for rent upon any such alleged agreement because of the express provisions of the statute of frauds, but was only liable in action at law upon a *quantum meruit* for use and occupation.

These defendants further show that the property in these proceedings described has greatly enhanced in value since 1872, when the first agreement for its lease was made with the complainant, and also since January, 1888, when the last agreement was made, and that the said property is now worth more than three times the amount which was stipulated to be paid for it under those agreements.

And these defendants further show that though the defendant Winslow in 1898 denied the complainant's right to purchase the said land or to any lease of the same, the complainant has slept upon its rights, if any it had, until the present time, and is therefore barred by its laches, and these defendants claim the same benefit and advantage of this defense as though they had specially pleaded the same or demurred to the bill for that reason.

Further answering said bill, these defendants say that they are informed and believe, and therefore charge, that this bill is instituted merely for delay; that the complainant was informed on the 31st of January, 1899, that the defendants were advised that the complainant was only a tenant at sufferance, and a lease or sale according to the terms of the agreement of January 30th, 1888, was refused. On the 23rd of January, 1900, it was served with a notice to quit said premises in accordance with the provisions of the landlord and tenant law of the District of Columbia. On the 8th of March, 1900, proceedings were instituted against it under that statute for possession, which proceedings, at the instance of the complainant,
23 were delayed until the 17th of April, when judgment was rendered against it. An appeal was then taken by the complainant, and nothing further was done until after the trial of appeals from justices of the peace was begun in this court, and the present bill was not filed until said appeal was about to be reached for trial; and these defendants aver that this course of the complainant has been such as to deprive it of the right to the extraordinary remedies of injunction and specific performance, through the aid of a court of equity, even if grounds for such relief had originally existed, which these defendants deny.

And, having fully answered, they pray to be hence dismissed with their reasonable costs.

FRANCIS WINSLOW, *Trustee.*
AMERICAN SECURITY & TRUST CO., *Trustee.*
WM. A. McKENNEY, *Trust Officer.*
AUGUSTUS JAY,
By WM. E. JOHNSON, *His Attorney.*

CARLISLE & JOHNSON,
Sol'rs for Defendants.

I do solemnly swear that I have read the aforegoing answer by me subscribed, and know the contents thereof, and that the matters and things therein stated on my personal knowledge are true, and those stated on information and belief I believe to be true.

FRANCIS WINSLOW.

Subscribed and sworn to before me this fifteenth day of October, A. D. 1900.

OSCAR LUCKETT,
[SEAL.] *Notary Public, D. C.*

(Endorsed:) No. 21764. In eq. The Baltimore & Ohio Railroad Company *vs.* Francis Winslow *et al.*, trustees. Joint and separate answer of all defendants.

Affidavit of Francis Winslow.

Filed October 15, 1900.

In the Supreme Court of the District of Columbia.

THE BALTIMORE AND OHIO RAILROAD Company *vs.* FRANCIS WINSLOW ET AL. } No. 21764. In Equity.

DISTRICT OF COLUMBIA, *ss:*

Francis Winslow, being duly sworn, deposes and says:

That he is one of the defendants in this cause and one of the trustees under the will of Catharine Pearson, deceased, and
24 one of those who executed the lease dated January 30th, 1888; that on or about the 17th of October, 1892, he signed in duplicate a new lease to the complainant similar in its terms with the one dated January 30th, 1888; that the new lease was prepared by the complainant or its officers, and this affiant believed that it was in accordance with the requirements of the lease of January 30th, 1888, and signed the same under that impression, and that it was never again seen by affiant until the fall of 1898, after the controversy between the complainant and this affiant as to the rights of the complainant arose, when it was exhibited to him in the office of the complainant, which had possession of both copies, neither of which were executed by this affiant's cotrustee, Augustus Jay, nor by the complainant. In December, 1897, this affiant left the United States and went to Nicaragua as secretary of the Nicaraguan canal commission; that during this affiant's absence in Nicaragua rent, at the rate paid under the lease of January 30th, 1888, was paid to the beneficiary under the trust by means of an order or draft of the complainant, which this affiant is informed and believes was drawn to his order and endorsed by the firm of Thomas J. Fisher and Company or some member thereof; that neither the said firm or any member thereof was the agent of this affiant or of his cotrustee, nor was the said firm nor any one of them authorized to make any agreement or arrangement with the complainant with respect to the leasing or selling of the real estate in these proceedings referred to, nor was the said firm nor any member thereof authorized to endorse any check, draft, order, or other paper with the name of this affiant or of his cotrustee, and this affiant had no knowledge of the payment of said rent or of the manner in which it had been effected until his return from Nicaragua, and neither of the trustees received any of the money.

In the summer of 1898 the complainant sent a similar order for the payment of money for rent of said premises which this affiant never presented or used in any way, and subsequently, in January and August of 1899, the complainant sent to this affiant similar orders, neither of which this affiant used.

In January, 1899, Mr. J. D. McCubbin, Jr., the agent of the complainant who signs the bill in this cause, wrote this affiant that he preferred to make a lease of the premises because he had no appropriation to purchase said land, and on the 18th of February, 1899, he again wrote to this affiant, saying:

"The present status of the company makes it a little troublesome to purchase property at this time, and therefore we would prefer a proposition to lease."

That at the time of so writing and for some time theretofore the complainant had gotten into financial difficulties, and was in the hands of a receiver under a decree of the courts of the United States, and this affiant is informed and believes was not at any time from January, 1888, to January, 1900, in a condition to purchase the land in question.

This affiant further says that the land in these proceed-
25 ings referred to has greatly increased in value since January, 1888, and that he is informed and believes that the square next to square seven hundred and ten, less available ground, has been recently sold for one dollar per foot, while the price at which complainant seeks to acquire this land is about thirty cents per foot.

This affiant further says that he and his cotrustee have no personal or beneficial interest in the property involved in this suit, their only interest being the proper discharge of their duties to the beneficiary under the terms of the will of Catharine Pearson, under which alone they exercise any authority in the premises.

Affiant further says that he had no opportunity to consult counsel in this matter until after his return from Nicaragua, when he was promptly advised that the complainant was not entitled to a renewal of the lease of January, 1888, or to the right of purchase contained in that lease, and that he promptly so advised the complainant, and has always maintained that position.

FRANCIS WINSLOW.

Subscribed and sworn to before me this fifteenth day of October, A. D. 1900.

OSCAR LUCKETT,
[SEAL.] *Notary Public, D. C.*

DEF'TS' EXHIBIT No. 1.

Filed Oct. 15, 1900.

This agreement made this thirtieth day of January in the year eighteen hundred and eighty-eight between Walter S. Cox, Francis Winslow and Augustus Jay, trustees of Mrs. Eliza Patterson, of the first part, and the Baltimore and Ohio Railroad Company of the second part.

Witnesseth, that the said parties of the first part in consideration of the rents hereinafter reserved do hereby demise lease and to farm-

let unto the said party of the second part all those lots of ground in the city of Washington in the District of Columbia known as lots numbered (9) nine (10) ten (11) eleven and (12) twelve in square numbered seven hundred and ten (710) containing about forty-one thousand nine hundred and seventy-five square feet.

To have and to hold to the said party of the second part its successors and assigns for the full term of five years from the first day of August 1887, yielding and paying therefor yearly and for every year the sum of seven hundred and fifty-five $\frac{55}{100}$ dollars. And the said parties of the first part hereby agree to and with the said party of the second part that at any time during the term aforesaid on payment to them by said party of the second part of the sum of twelve thousand five hundred and ninety-two dollars they will convey the premises aforesaid to said party of the second part its successors and assigns by a good and sufficient deed in fee-simple with all the title and estate therein of the said parties of the first
26 part and further that at or before the expiration of the term aforesaid at the request of said party of the second part its successors and assigns they will renew the lease with the same agreements and privileges as herein contained for another term of five years or until such time as the said parties of the first part shall be prepared to convey the said premises as hereinbefore agreed with the perfect title in fee-simple thereto and in case said par*ties* of the second part shall omit to make the said request at or before the expiration of said term the said part*y* of the first part *is* required to notify said party of the second part of the expiration of said term and require it to exercise its election to renew said lease and the privilege of renewing the same as aforesaid shall continue for three months after such notice.

In witness whereof the said parties of the first part have hereunto set their hands and seals, and the party of the second part has caused its corporate name to be hereunto subscribed by Samuel Spencer, its president, and its corporate seal to be hereunto affixed on the day and year first above written.

WALTER S. COX, *Trustee.* [SEAL.]
FRANCIS WINSLOW, *Trustee.* [SEAL.]
AUGUSTUS JAY, *Trustee.* [SEAL.]
THE BALTIMORE AND OHIO RAILROAD COMPANY,
By S. SPENCER, *President.*

[Seal of B. & O. R. R.]

Executed in duplicate.

Attest: ANDREW ANDERSON, *Secretary.*

Witness:
C. H. ARMFIELD,
As to Winslow.

Witness as to W. S. Cox:
MARY R. COX.

Witness as to Aug. Jay:
HENRY VIGNAUD.

(Endorsed:) No. 21764. In eq. The B. & O. R. R. *vs.* Francis Winslow *et al.* Defendants' Exhibit No. 1.

DEFENDANTS' EXHIBIT No. 2.

Filed Oct. 15, 1900.

The Last Will and Testament of Catherine Pearson, of Washington County, in the District of Columbia.

In the name of God—Amen.

I Catherine Pearson do make publish & declare this instrument of writing to be my last will & testament hereby revoking all other wills & testaments by me heretofore made.

27 First. I hold in my custody, as guardian of William N. Worthington the son of my late deceased brother William M. Worthington by an appointment from the orphans' court of the county aforesaid the sum of six thousand dollars it being a legacy from his uncle the late Dr. N. W. Worthington for this sum and the interest thereon, less nine hundred dollars which I paid to his mother for his account in three sums for which I hold her receipt I am accountable; and I direct that the same shall be paid by my executors hereinafter named without delay to such person or persons as may be entitled to receive the same.

Secondly. I charge my estate with the payment of my funeral expenses & testamentary expenses, just debts & other legacies bequeathed in this my last will & testament and direct that the same shall be speedily paid.

Thirdly. I give to my dear grandson Augustus Jay the sum of one thousand dollars as a testimony of my tenderest love for him; rejoicing sincerely on his account that it has pleased our Heavenly Father to bestow on him from other sources so large an inheritance that no further provision from me is required by or would be useful for him. If my said grandson shall not have attained the age of twenty-one years at the time of my death I direct that the said legacy or sum of one thousand dollars shall be invested by my said executors and accumulated for his use, and on his attaining that age the same shall be paid to him:—but if it shall happen—which God forbid—that my said grandson shall die before he attains the age of twenty-one—my will is that the said legacy or sum of one thousand dollars shall fall in and become part of the residuum of my estate & shall be disposed of as is hereinafter provided in reference to such residuum.

Fourthly. I give to my dear relative Catherine J. Gaston the sum of one thousand dollars as a testimony of my devoted love and affection for her and direct that the same be speedily paid to her by my executors hereinafter named.

Fifthly. I give to my beloved niece Eliza Worthington daughter of my brother John Worthington the sum of one thousand dollars as a testimony of my tender love and affection for her and direct that the same be paid to her by my executor hereinafter named.

Sixthly. I give to Ellen Farley the beloved daughter of John and Anna Farley the sum of one thousand dollars in testimony of my sincere love and affection for her and direct that my executors pay the same to her: and in the event of the death of the said Ellen Farley before my own decease, my will is that the said legacy or sum of one thousand dollars be paid by my executors hereinafter named to her brother Joseph Pearson Farley.

Seventhly. All the rest and residue of my estate real and personal wheresoever situated I give and devise to Carlile P. Patterson, William H. Philip, & Walter S. Cox or the survivors & survivor of them to be by them held as trustees for the sole and separate use of my dear daughter Eliza Patterson during the term of her natural life & so that the same shall not be liable for the debts or subject to
28 the control contracts or engagements of her present or any after-taken husband; to permit her by herself, or her special attorney appointed in writing to be signed by her to receive the annual income & profits of the same for her own sole and separate use, her receipt or that of her attorney so appointed as aforesaid alone to be an acquittance to the person or persons charged with the payment of such income or any part of the same & to the extent only therein expressed to have been paid:—and if she please to occupy possess and use for her own account accommodation & convenience & that of her family any part of the property real and personal so held for her separate use & benefit she shall be allowed to do so: and if at any time the said Eliza Patterson shall in writing to be signed by her in the presence of & to be attested by a subscribing witness desire the said Carlile P. Patterson, William H. Philip and Walter S. Cox or the survivors & survivor of them to sell any part of the estate real & personal held by them for her separate use, for the purpose of changing the investment thereof, it shall be lawful for the said named trustees or the survivors or survivor of them to sell the same for such purpose only & to transfer and convey the absolute estate in fee therein, to the purchaser thereof; to receive the proceeds of any & every such sale of the purchaser who shall not be required to see to the application thereof; and to invest the same in such manner as the said Eliza W. Patterson may require; and such new investment shall be held by the said trustees for the same use trusts & purposes & with the same powers & authority of sale and reinvestment as is herein declared of & concerning the original trust subject & separate estate.

And after the death of the said Eliza W. Patterson the said named trustees & their successors shall hold the said trust subject & separate estate—original and subsequently acquired by sale and reinvestment—for the use & benefit of any child, or children, of the said Eliza W. Patterson & the issue of any child or children of the said Eliza who may die leaving issue in the lifetime of the said Eliza & such issue shall take the share or portion of the said estate which their parent or parents would have taken had they survived the said Eliza. And if the said Eliza W. Patterson shall die without leaving a child or children or issue of any child or children, living at the time of her death, the said trustees & their successors

shall hold the said trust subject & separate estate for my right heirs. And if it shall happen that either of the said trustees shall die, or become incapable of acting, or shall refuse to act in the execution of said trusts, then & in every such case, the continuing trustees or trustee shall from time to time nominate some other person or persons to be approved by the said Eliza W. Patterson to be trustee or trustees in the place & stead of the person or persons so dying, or becoming incapable or refusing to act and shall convey & settle the said trust subject & separate estate in such manner, that the same shall be legally vested in such continuing trustees or trustee and such person or persons so named & appointed to that office for the same uses trusts & purposes & with the same power & authority of ad-
29 ministration sale & reinvestment as is hereinbefore declared of & concerning the said trusts subject & estate and the said new trustee or trustees shall have the same power to act in the premises in conjunction with the continuing trustee or trustees and as survivors of them, as if they had been originally named trustee or trustees in the premises in this my last will and testament.

I do hereby nominate and appoint Carlisle P. Patterson, William H. Philip and W. S. Cox to be the executors of this my last will and testament.

In testimony of all which I have hereunto subscribed my name & affixed my seal this fourth day of December in the year 1862.

CATHERINE PEARSON. [SEAL.]

Signed, sealed, published, & declared by the testatrix, Catherine Pearson as & to be her last will & testament in our presence, who have, at her request & in the presence of each other, hereunto subscribed our names as witnesses.

Witnesses:

JANE KENDALL.
AMOS KENDALL.
WM. STICKNEY.

(Endorsed:) No. 21764. In equity. The B. O. R. R. *vs.* Francis Winslow *et al.* Defendants' Exhibit No. 2.

Orphans' Court.

JUNE 30TH, 1868.

DISTRICT OF COLUMBIA, *Washington County,* } *To wit:*

This day appeared William Stickney, one of the subscribing witnesses to the aforegoing last will and testament of Catharine Pearson, late of Washington county aforesaid, deceased, and solemnly made oath on the Holy Evangels of Almighty God that he did see the testatrix therein named sign and seal said will; that she published, pronounced, and declared the same to be her last will and testament; that at the time of so doing she was, to the best of his apprehension, of sound and disposing mind, memory, and understanding, and capable of executing a valid deed or contract, and that his name as witness to the aforesaid will was signed in the

presence and at the request of the testatrix and in the presence of Jane Kendall and Amos Kendall, the other subscribing witnesses thereto.

Test: JAS. R. O'BEIRNE,
Register of Wills.

Orphans' Court.

JUNE 30TH, 1868.

DISTRICT OF COLUMBIA, *Washington County,* } *To wit:*

This day appeared Amos Kendall, one of the subscribing witnesses to the aforegoing last will and testament of Catharine Pearson,
30 late of Washington county aforesaid, deceased, and solemnly, sincerely, and truly affirmed that he did see the testatrix therein named sign and seal said will; that she published, pronounced, and declared the same to be her last will and testament; that at the time of so doing she was, to the best of his apprehension, of sound and disposing mind, memory, and understanding, and capable of executing a valid deed or contract, and that his name as witness to the aforesaid will was signed in the presence and at the request of the testatrix and in the presence of Jane Kendall and William Stickney, the other subscribing witnesses thereto.

Test: JAS. R. O'BEIRNE,
Register of Wills.

Orphans' Court.

JUNE 30TH, 1868.

DISTRICT OF COLUMBIA, *Washington County,* } *To wit:*

This day appeared Amos Kendall and solemnly, sincerely, and truly affirmed that he is well acquainted with the handwriting of Jane Kendall, one of the subscribing witnesses to the aforegoing last will and testament of Catharine Pearson, late of Washington county aforesaid, deceased, having often seen her write; that he verily believes the signature "Jane Kendall" to said will to be the genuine signature of the said Jane Kendall, and that it is well known to him that the said Jane Kendall has departed this life.

Test: JAS. R. O'BEIRNE,
Register of Wills.

[U. S. int. rev. stamps, $97.50.]

DISTRICT OF COLUMBIA, *To wit:*

I, Hiram J. Ramsdell, regis er of wills for the District of Columbia, do hereby certify that the foregoing is a true copy of the original will of Catharine Pearson, deceased, and the probates thereto filed and recorded in the office of the register of wills for the District of Columbia aforesaid, and also that the said will after having been proven by the witnesses whose names appear in the foregoing probates was by order of the supreme court of the District of Columbia, holding a special term for orphans' court business, duly admitted to

probate and record on the 30th day of June, A. D. one thousand eight hundred and sixty-eight.

In testimony whereof I hereunto subscribe my name and affix the seal of the said supreme court, special term for orphans' court business, this 15th day of December, anno Domini 1884.

H. J. RAMSDELL,

[SEAL.] *Register of Wills for the District of Columbia.*

31 DEFENDANTS' EXHIBIT No. 3.

Filed Oct. 15, 1900.

Supreme Court, District of Columbia.

Filed June 13, 1892. J. R. Young, Clerk.

WALTER S. COX, Trustee,
v.
ELIZA W. PATTERSON & Others. } In Equity. 13707, Eq. Doc. 33.

It appearing to the court that due notice of the object and substance of the bill of complaint was given to all the defendants by publication, and that said defendants have not appeared and made answer to the said bill, and that the same was taken for confessed against said defendants by order passed in this cause on the 4th day of May last—

It is by the court this 13th day of June, A. D. 1892, ordered, adjudged, and decreed that the prayer of the bill be granted, and that the appointment of Francis Winslow and Augustus Jay as trustees in the place of Carlisle Patterson and William H. Philip, deceased, under the will of Catharine Pearson, heretofore made by said Walter S. Cox, as surviving trustee under said will, be, and it is hereby, ratified and confirmed; and it is further adjudged and decreed that the said complainant, Walter S. Cox, be, and he is hereby, relieved and discharged from the trusts created by said will, and that the title and estate in and to all the property, real and personal, now held by said trustees be, and it is hereby, transferred to and vested in the said Francis Winslow and Augustus Jay, their heirs, executors, adm'n'rs, and assigns, subject to the trusts aforesaid, and that said Walter S. Cox do execute all such conveyances, transfers, or indorsements as may be necessary or convenient more completely to carry into effect the object of this decree.

A. C. BRADLEY, *Justice.*

[Seal of Sup. Court of the Dis. of Col.]

A true copy.
Test:

J. R. YOUNG, *Clerk,*
By M. C. CLANCY, *Ass't Clerk.*

(Endorsed:) No. 21764. In eq. The B. & O. R. R. *vs.* Francis Winslow *et al.* Defendants' Exhibit No. 3.

DEFENDANTS' EXHIBIT No. 4.

Filed Oct. 15, 1900.

This agreement, made this — day of August, A. D., 1897, between Francis Winslow and Augustus Jay, trustees of the estate of Eliza Patterson, deceased, of the first part, and the Baltimore and Ohio Railroad Company, of the second part, witnesseth,

32 That the said parties of the first part in consideration of the rents hereinafter reserved, have demised and let and do hereby demise and let unto the said Baltimore and Ohio Railroad Company, party of the second part, its successors and assigns, all those parcels of real estate situated in the city of Washington, District of Columbia known and designated as and being lots numbered nine (9), ten (10), eleven (11), and twelve (12), in square numbered seven hundred and ten (710), containing about forty-one thousand one hundred and seventy-five (41,175) square feet of ground, together with all the improvements and appurtenances thereto belonging.

To have and to hold the same with the appurtenances unto the said Baltimore and Ohio Railroad Company, its successors and assigns, for the full term of five years, commencing with the first day of August, A. D., 1897, and ending on the 31st day of July, 1902.

And in consideration of said demise and letting the said Baltimore and Ohio Railroad Company hereby agrees to pay to the said parties of the first part the sum of seven hundred and fifty-five $\frac{55}{100}$ dollars ($755.55) per annum.

And the said parties of the first part further agree with the party of the second part that at any time during the term aforesaid upon payment to them, the said parties of the first part, of the sum of twelve thousand five hundred and ninety-two dollars ($12,592.00), they will convey the premises aforesaid to the said party of the second part, or to the Real Estate and Improvement Company of Baltimore City, their or its successors and assigns, by giving a good and sufficient deed in fee-simple; and further that at or before the expiration of the term aforesaid, at the request of the said party of the second part, its successors and assigns, they will renew this lease, with the same agreements and privileges as are herein contained, for another term of five years, or until such time as said parties of the first part shall be prepared to convey the said premises as hereinbefore agreed with a perfect title in fee-simple thereto; and in case said party of the second part shall omit to make said request at or before the expiration of said term, the said parties of the first part are required to notify the party of the second part of the expiration of said term, and require it to exercise its election to renew said lease, and the privilege of renewing the same, as aforesaid, shall continue for three months after such notice.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals this — day of ——, A. D. 1897, and the said party of the second part hath caused these presents to be

signed in its corporate name, and its corporate seal to be hereto affixed by —— ——, its —, the day and year first above written, in duplicate.

—— ——. [SEAL.]
—— ——. [SEAL.]

Signed, sealed, and delivered in the presence of—
—— ——.

33 (Endorsed:) No. 21764. In eq. The B. & O. R. R. *vs.* Francis Winslow *et al.* Defendants' Exhibit No. 4.

Order Continuing Restraining Order.

Filed October 17, 1900.

In the Supreme Court of the District of Columbia.

THE BALTIMORE AND OHIO RAILROAD COMPANY
vs.
FRANCIS WINSLOW ET AL. } Equity. No. 21764.

This cause coming on to be heard upon the temporary restraining order issued herein on the fourth day of October, A. D. 1900, on complainant's petition and on the answer of the defendants, and having been argued by counsel and submitted to the court, it is, this 17th day of October, A. D. 1900, ordered that said restraining order be, and the same is hereby, continued in full force and effect until the final hearing of this cause, provided the complainant shall within four days tender to the defendant the full amount of any and all installments of rent unpaid which would be due to August 3, 1900, by the terms of the lease set up in the bill of complaint, the payment and acceptance of which shall not operate to prejudice or in any way affect the rights or claims of any of the parties hereto otherwise than to be a credit, as of the day of payment, upon such amount, if any, as the defendant may be ultimately entitled to recover from the complainant. It is further ordered that the complainant shall complete its testimony within thirty days from this date, and the defendants shall complete their testimony within ten days thereafter; the complainant to have five days after the close of the defendants' testimony within which to offer their testimony in rebuttal.

JOB BARNARD, *Justice.*

Depositions on Behalf of Complainant.

Filed Nov. 20, 1900.

In the Supreme Court of the District of Columbia.

THE BALTIMORE AND OHIO RAILROAD Company
vs.
FRANCIS WINSLOW ET AL. } In Equity. No. 21764.

At the request of Messrs. Hamilton & Colbert, solicitors for the complainant, I have this day fixed Wednesday next, November 14, 1900, at two o'clock in the afternoon of that day, and their law offices, No. 512 F street northwest, in Washington city, District of
34 Columbia, as the time and place when and where testimony on behalf of the complainant in the above-entitled cause will be taken before me.

ALBERT HARPER,
Examiner in Chancery.

November 10, 1900.

To Messrs. Carlisle & Johnson, solicitors for defendants:

Take notice that at the time and place fixed in the foregoing order we shall take testimony on behalf of the complainant in the above-entitled cause.

(Signed) HAMILTON & COLBERT,
Solicitors for Complainant.

November 10, 1900.

Service acknowledged this 10th day of November, 1900.

(Signed) CARLISLE & JOHNSON,
Sol'rs for Def'ts.

In the Supreme Court of the District of Columbia.

THE BALTIMORE & OHIO RAILROAD Company
vs.
FRANCIS WINSLOW ET AL. } In Equity. No. 21764.

Be it remembered that at an examination of witnesses begun and held on the 14th and 20th days of November, 1900, pursuant to notice and agreement, personally appeared before me, Albert Harper, an examiner in chancery of the supreme court of the District of Columbia, the within-named John D. McCubbin, Jr., Edward J. Stellwagen, George E. Hamilton, and William B. Turpin, who being produced as witnesses of lawful age for and on behalf of the complainant and being first duly sworn and cautioned to tell the truth, the whole truth, and nothing but the truth touching the matters at issue in the above-entitled cause, did depose and say as follows:

NOVEMBER 14, 1900—Wednesday, 2 o'clock p. m.

Met pursuant to foregoing notice.

Appearances: George E. Hamilton, Esq., of solicitors for the complainant; William G. Johnson, Esq., of solicitors for the defendants, one of whom, Francis Winslow, is present; also the examiner, and—

JOHN D. MCCUBBIN, JR., who, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HAMILTON:

Q. You are the real-estate agent of the Baltimore & Ohio Railroad Company?

A. Yes.

35 Q. And you have been in charge or control of the real-estate matters connected with that company for how long?

A. Since about October, 1896, as its real-estate agent.

Q. You have charge of the records relating to the real-estate matters of the Baltimore & Ohio Railroad Company?

A. Yes.

Q. I have here three leases—one dated August 1, 1872, between Carlisle P. Patterson, William H. Philip, and Walter S. Cox, trustees, and the Baltimore & Ohio Railroad Company; another dated February 1, 1883, between Walter S. Cox, Augustus Jay, and Francis Winslow, trustees; Eliza W. Patterson, and the Baltimore & Ohio Railroad Company, and the other dated October 17, 1892—between Walter S. Cox, Francis Winslow, and Augustus Jay, trustees, and the Baltimore & Ohio Railroad Company, copies of which three leases are filed as Complainant's Exhibits Nos. 1, 2, and 3 to the bill of complaint in this cause. Will you state, Mr. McCubbin, if these leases were among the records of the real-estate office of the Baltimore & Ohio Railroad Company.

A. Yes.

Q. Are they all the leases pertaining to the property involved in this suit among those records?

A. I have found one other, which I now hand to Mr. Hamilton, since the other leases were sent to him.

Mr. HAMILTON: I have here, Mr. Johnson, one other lease, dated January 30, 1888, between Walter S. Cox, Francis Winslow, and Augustus Jay, trustees, and the Baltimore & Ohio Railroad Company, which lease I only got possession of today.

Mr. JOHNSON: And copy of which is filed as Defendants' Exhibit No. 1 to the answer of the defendants in this cause.

Mr. HAMILTON: Solicitors for the complainant here give in evidence those four original leases.

Mr. JOHNSON: It is admitted by the defendants, through their solicitors, that the signatures appearing on said four leases are the genuine signatures of the parties thereto.

But the lease dated August 1, 1872, is objected to on the ground

of its irrelevancy and immateriality and because it does not appear to have been signed or properly authorized by Eliza W. Patterson, and also because its force and effect, if any, was superseded by a subsequent lease between the same parties.

The same objections are made to the lease dated February 1, 1883, and, further, that it was never executed by the Baltimore & Ohio Railroad Company.

The lease dated January 30, 1888, is objected to for the same reasons noted as to the first lease.

And the lease dated October 17, 1892, is objected to because it was not executed by the said trustees, nor by the Baltimore & Ohio Railroad Company, and because it was not properly authorized by Eliza W. Patterson.

NOTE.—It is agreed between counsel that the examiner
36 compare said original leases with the copies thereof, filed as Complainant's Exhibits Nos. 1, 2, and 3 to the bill of complaint, and Defendants' Exhibit No. 1 to the answer of the defendants in this cause, and that if said exhibits are true copies they be referred to and considered in evidence in lieu of the originals, which are to be returned to the complainant.

Q. Did you, Mr. McCubbin, have any communication with the trustees of the Patterson estate in regard to renewal of the lease relating to the property in controversy?

A. Yes.

Q. Will you state what was done by you in that regard?

A. I endeavored to locate the trustee; and, being unable to do so, I prepared notices and sent them to the addresses given me—one I think to Mr. Winslow, and one to Mr. Jay, and one to Judge Cox—the last of whom replied that he was no longer trustee.

Q. Did you send those notices to Judge Cox and to Mr. Winslow direct?

A. As I remember, I did. I sent one to Judge Cox at some place in North Carolina; later I sent a notice through Thos. J. Fisher & Co., of this city, who I understood were general agents for the Patterson estate, and that last notice was acknowledged by a letter from Mr. Winslow.

Q. Is this a duplicate copy of the notice (copy of which is Complainant's Exhibit No. 4 to the bill of complaint), under date of August 4, 1897, which you sent to Judge Cox?

A. Yes, sir; I find that I sent this notice to Judge Cox at Washington, D. C.

Mr. HAMILTON: Solicitors for the complainant here give that notice in evidence.

NOTE.—It is agreed between counsel that the examiner compare said notice with the copy thereof filed as Complainant's Exhibit No. 4 to the bill of complaint in this cause, and that if said exhibit be a true copy it be referred to and considered in evidence in lieu of the duplicate copy of said notice just produced.

Q. Did you receive any communication from Judge Cox in reply to that notice?

A. I did. I received this letter from him dated August 8, 1897.

Mr. HAMILTON: Soiicitors for the complainant here give that letter in evidence.

NOTE.—And the same is herewith filed in evidence, marked Exhibit A. H. No. 1. See page 32 of this record.

Q. Is this a duplicate copy of the notice sent to Mr. Francis Winslow?

A. Yes, sir; this is a copy of the notice sent to Mr. Francis Winslow at Newberne, North Carolina.

Mr. HAMILTON: Solicitors for the complainant here give that notice in evidence.

37 NOTE.—And the same is herewith filed in evidence, marked Exhibit A. H. No. 2. See page 33 of this record.

Q. Is this the letter you spoke of receiving from Mr. Francis Winslow, dated Washington, D. C., September 27, 1897, acknowledging receipt of that notice?

A. Yes.

Mr. HAMILTON: Solicitors for the complainant here give that letter in evidence.

NOTE.—And the same is herewith filed in evidence, marked Exhibit A. H. No. 3. See page 34 of this record.

Q. What, if anything, did you do after this with regard to the matter?

A. I think I forwarded notices through Thomas J. Fisher & Co., of this city, who I understood were general agents of the Patterson estate.

Q. And it was in reply to those notices that you received these answers filed here in evidence as Exhibits A. H. Nos. 1 and 3?

A. Yes.

Q. What, if anything, did you do after that in regard to this matter?

A. About that time I forwarded the old lease to Mr. George E. Hamilton, as counsel of the Baltimore & Ohio Railroad Company, requesting him to prepare a new lease.

Q. Are the letters dated July 31 and August 4, 1897, which I now show you, relating to a renewal of the lease?

A. Yes.

Mr. HAMILTON: Solicitors for the complainant here give in evidence said letters.

Mr. JOHNSON: The admission of which in evidence is objected to as being immaterial and irrelevant.

NOTE.—And the same are herewith filed in evidence, respectively marked Exhibit- A. H. Nos. 4 and 5. See pages 34 & 35 of this record.

Q. Is this the copy of the lease referred to in your letter of July 31, 1897 (Exhibit A. H. No. 4), together with memorandum of sug-

gestion mentioned in your letter of August 4, 1897—Exhibit A. H. No. 5?

A. Yes.

Mr. HAMILTON: Solicitors for the complainant here give in evidence said copy of lease and memorandum thereto.

Mr. JOHNSON: The admission of which in evidence is objected to as being immaterial and irrelevant.

NOTE.—And the same is herewith filed in evidence, marked Exhibit A. H. No. 6. See page 36 of this record.

Q. What other communication, if any, did you have with Mr. Francis Winslow regarding the matter of a renewal of the lease just referred to?

38 A. We had a conversation one day in my office, or perhaps in Mr. Bond's office, and my recollection is that Mr. Winslow wanted to raise the price specified in the lease, but I refused to entertain any such proposition. I think several letters passed between us on the same subject, and there was a proposition to renew the lease or take the property at the price stipulated in the old lease, but we did not get together.

Q. And no lease was executed?

A. No, sir; no lease was executed for a continuation of the terms.

Q. In the following January or February of 1898, did you have anything personally to do with a voucher sent by the Baltimore & Ohio Railroad Company and representing a half-yearly rent for this property?

A. A voucher was prepared in my office and signed by me as real-estate agent, in favor of Francis Winslow, trustee. I think Mrs. Patterson sent that voucher back, asking that it be made out to her or made in the name of Winslow, Jay, and Cox; but, having already been informed by Judge Cox that he was no longer trustee, I referred the matter to our counsel, Mr. George E. Hamilton, and I was advised to let the voucher remain as it was and send it through Thos. J. Fisher & Co., and accept the endorsement of that firm thereof, which we did, and paid the money thereon.

Q. Is this the voucher you refer to?

A. Yes, sir; being No. 24795.

Mr. HAMILTON: Solicitors for complainant here give in evidence said voucher.

NOTE.—And the same is herewith filed in evidence, marked Exhibit A. H. No. 7. See page 38 of this record.

Q. You spoke of a letter from Mrs. Patterson——

A. Yes; and there were several of them.

Q. Are these the letters you refer to as coming from Mrs. Eliza W. Patterson?

A. Yes.

Mr. HAMILTON: I cannot get at Mrs. Patterson to prove her signature to these five letters just produced.

Mr. WINSLOW: Her genuine signature is to each of those five letters just produced.

Mr. JOHNSON: And it is so admitted by solicitors for defendants.

Mr. HAMILTON: One of these five letters, dated January 31, 1898—that is, copy of it—is Complainant's Exhibit No. 6 to the bill of complaint in this cause.

NOTE.—It is agreed between counsel that the examiner compare said original letter of January 31, 1898, with the copy thereof filed as Complainant's Exhibit No. 6 to the bill of complaint in this cause, and that, if said exhibit be a true copy, it be referred to and considered in evidence in lieu of the original, which is to be returned to the complainant.

Mr. HAMILTON: Solicitors for the complainant here give in
39 evidence the other four letters of Eliza W. Patterson, dated respectively January 12th and 27th and February 3rd and 5th, 1898.

Mr. JOHNSON: Solicitors for the defendants object to the admission in evidence of said five letters, including the one of January 31, 1898, copy of which has just been filed in evidence as Complainant's Exhibit No. 6 to the bill of complaint in this cause, as being irrelevant and immaterial to the issues in this cause.

NOTE.—And said four letters are herewith filed in evidence, respectively marked Exhibits A. H. Nos. 8, 9, 10, and 11. See pages 39 & 40 of this record.

Q. Did you have anything else to do, Mr. McCubbin, with relation to this voucher (Exhibit A. H. No. 7) that you recall?

A. I think that I have stated all that I did in regard to that. I authorized the treasurer to send that draft or voucher (Exhibit A. H. No. 7) to Thos. J. Fisher & Co., and accept their endorsement as agent. That is about the last I had to do with it—that is, with the voucher.

Q. Had you at that time been advised of the willingness of Thos. J. Fisher & Co. to act in this particular?

A. That is my recollection.

Mr. JOHNSON: That is objected to as immaterial.

Q. Subsequent to this have you had any communication with the trustees or with Mr. Francis Winslow particularly in regard to the question of the lease of this property?

A. I have a batch of correspondence here that passed between myself and another official of the Baltimore and Ohio Railroad Company, and the trustees of Mrs. Eliza W. Patterson, and Mr. Francis Winslow in particular.

Mr. HAMILTON: Solicitors for the complainant here give in evidence said batch of correspondence, viz:

Letter dated January 20, 1899; W. H. Ijams, treasurer, to Francis Winslow, trustee;

Letter dated January 25, 1899; Francis Winslow to J. D. McCubbin, Jr.;

Letter dated January (or February) 28, 1899; J. D. McCubbin, Jr., to Francis Winslow;

Letter dated January 31, 1899; Francis Winslow to W. H. Ijams;

Letter dated February 15, 1899; Francis Winslow to J. D. McCubbin, Jr.;

Letter dated February 18, 1899; J. D. McCubbin, Jr., to Francis Winslow;

Letter dated April 18, 1899; C. H. Moran to Francis Winslow;

Letter dated April 21, 1899; J. D. McCubbin, Jr., to Francis Winslow;

Letter dated April 27, 1899; Francis Winslow to J. D. McCubbin, Jr., and

Letter dated January 23, 1900; J. D. McCubbin, Jr., to the trustees of Mrs. Eliza Patterson.

40 Mr. JOHNSON: The genuineness of said letters is admitted by solicitors for defendants, but their admission in evidence is objected to as being irrelevant and immaterial.

NOTE.—Copies of said two original letters of February 18, 1899, and January 23, 1900, being Complainant's Exhibits Nos. 8 and 9 to the bill of complaint in this cause; it is agreed between counsel that the examiner compare said originals with said exhibited copies, and that if said exhibits are true copies they be referred to and considered in evidence in lieu of the originals thereof to be returned to the complainant.

And the other- of said batch of letters just given in evidence, eight in number, are herewith filed in evidence, respectively marked Exhibits A. H. Nos. 12 to 19, inclusive. See pages 41 to 47 of this record.

Q. Outside of the correspondence just produced and here given in evidence as passing between the officials of the Baltimore & Ohio Railroad Company and Francis *Wilson*, trustee, relating to the matter of the lease of this property, did you have any other communication or connection with the trustees or with Mr. Winslow personally?

A. No, sir. I find several letters from Mrs. Patterson——

Q. (Interposing.) I am calling your attention to a time since August, 1897.

A. As I stated before, I had one interview with Mr. Winslow. That is the only one that I remember now, except the day we came over to the office of the justice of the peace.

Q. Then, Mr. McCubbin, do your records or those of the Baltimore & Ohio Railroad Company show that from the date of the 1st lease, which was in 1872, up to and including the voucher sent in 1897—Exhibit A. H. No. 7—the rent for this property was uniformly paid?

A. Yes.

Q. You have the vouchers therefor, have you not?

A. I have most of them here; some of them I could not get at because they were put away in boxes among the files.

Mr. JOHNSON: Solicitors for the defendants admit that all rent under the several leases of this property has been fully paid.

Q. Are there any other communications covering the time of the several leases from Mrs. Patterson and relating thereto?

A. I have a number of letters here from Mrs. Patterson to our treasurer asking prompt remittances of checks for the rent. She seemed to be rather anxious to get her rental nearly every six months.

Q. Are these some of those letters?

A. Yes, sir; and I think I can find some more.

Mr. JOHNSON: Solicitors for the defendants admit the genuineness of the batch of letters just produced from Eliza W. Patterson.

Mr. HAMILTON: Solicitors for the complainant here give said batch of letters, nineteen in number, in evidence.

41 NOTE.—And the same are herewith filed in evidence, respectively marked Exhibits A. H. Nos. 20 to 38, inclusive. See pages 47 to 48 of this record.

Mr. HAMILTON: Solicitors for complainant here give in evidence original letter dated Mattapoisett, Massachusetts, September 27, 1897, from Francis Winslow to M. J. Colbert, copy of which is Complainant's Exhibit No. 5 to the bill of complaint.

NOTE.—And it is agreed between counsel that said copy (Complainant's Exhibit No. 5 to the bill of complaint), after comparison by the examiner, may be referred to and considered in evidence in lieu of the original to be returned to the complainant.

Cross-examination.

By Mr. JOHNSON:

Q. I think you said, Mr. McCubbin, that you had one interview with Mr. Francis Winslow?

A. I said that I remembered only one interview with him.

Q. And that took place in Baltimore city, Maryland, either in your office or that of Mr. Bond—that is, in the offices of the Baltimore & Ohio Railroad Company?

A. That is my recollection.

Q. As I understand it, on that occasion or prior to that occasion a dispute as to the rights of the Baltimore and Ohio Railroad Company and of these trustees had already arisen?

A. I do not remember just the date of that interview with Mr. Winslow, and therefore I cannot say whether or not the dispute had arisen at that time.

Q. Was not that interview in the fall of 1898?

A. I think it was.

Q. Do you recall that on that occasion Mr. Winslow, as you say, wanted to make an arrangement either to rent or lease the property at a higher rate of rental, or to sell on some different basis than that described in the lease?

A. That is my recollection. That interview, I know, was after the acknowledgment of the notice to Mr. Winslow.

Q. And you declined to entertain propositions of that character at that time?

A. Yes.

Q. So that the controversy to some extent had already commenced between the officials of the Baltimore & Ohio Railroad Company and Mr. Francis Winslow on behalf of the trustees?

A. I think that was the opening of it. We did not understand, upon receipt of that letter from Mr. Winslow, that there was any controversy, but that Mr. Winslow merely preferred to sell than to lease the property.

Q. At all events, when you did see Mr. Winslow, that is the substance of what took place between you?

A. As I recollect, yes.

42 Q. Do you recall that in that interview Mr. Winslow told you it was his idea that the Baltimore & Ohio Railroad Company had no rights under the lease, but that it was a matter about which he intended to consult counsel?

A. I think he did.

Q. No agreement of any sort was ever reached between you and Mr. Winslow or the other trustees thereafter?

A. No agreement except the original agreement.

Q. No agreement was reached after that?

A. No.

Q. You became the real-estate officer of the Baltimore & Ohio Railroad Company in October, 1896?

A. Yes.

Q. So that you had nothing to do personally with the preparation or execution of any of the four leases which have been given in evidence here?

A. None of the executed leases.

Q. That is, those of 1872, 1883, and 1888 and 1892?

A. No.

Q. All of the letters and other papers which you have produced here, I suppose, came properly into your custody as the real-estate officer of the Baltimore & Ohio Railroad Company?

A. Yes.

Q. And such as did not come into your possession while you were that officer you found among the files when you took charge of that department of the Baltimore & Ohio Railroad Company?

A. I think all of the letters which have been given in evidence here, excepting the letters of Mrs. Patterson, are letters to and from me.

Q. But the letters from Mrs. Patterson and the leases that have been given in evidence here were in the files of that department?

A. The letters were attached to the original vouchers and the leases were in the files of leases.

Q. As the real-estate officer of the Baltimore & Ohio Railroad Company, they properly came into your custody when you took charge of that department?

A. The leases themselves did, but the vouchers with the letters attached to them were on file with the treasurer, and I withdrew them from the files of the treasurer.

Q. You are now the proper custodian of all papers pertaining to

this matter, whether they arose during or before your holding of that office?

A. Of all leases.

Q. And the correspondence with respect to them?

A. And the correspondence with respect to the leases, but understand that I am not the custodian of the vouchers. That is a matter for the treasurer.

Q. The vouchers for the payment of money pertain to the treasurer's office?

A. That is right.

43 Q. But all other papers pertaining to this matter would be in your office, and you would be the present custodian of them?

A. Yes.

Redirect.

By Mr. HAMILTON:

Q. Acting under my instructions, you have endeavored to bring down with you, for the purpose of offering in evidence here, all papers relating to this matter?

A. Yes.

Q. And you have done so?

A. Yes.

Q. Is The Baltimore & Ohio Railroad Company, the complainant in this cause, ready at this time to purchase or to lease, under a renewal of the lease, this property according to the terms of the old lease and the right of renewal of that lease which they claim?

A. Yes.

J. D. McCUBBIN, JR.

Subscribed and sworn to before me this 14th day of November, 1900.

ALBERT HARPER, *Examiner.*

EDWARD J. STELLWAGEN, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HAMILTON:

Q. You are a member of the real-estate firm of Thos. J. Fisher & Co. in this city?

A. I am.

Mr. HAMILTON: I have here, Mr. Johnson, copies of correspondence produced by Mr. Stellwagen from the files of his office; do you require production of the originals thereof?

Mr. JOHNSON: Solicitors for the defendants waive production of the originals of said correspondence and admit the genuineness

thereof, but object to its admission in evidence as being irrelevant and immaterial to the issues in this case.

Mr. HAMILTON: Solicitors for complainant here give in evidence said correspondence, viz:

Letter dated November 18, 1887; F. Winslow to "Dear Fisher;"

Letter dated November 23, 1887; Thomas J. Fisher to Francis Winslow;

Letter dated January 18, 1888; F. Winslow to Thos. J. Fisher & Co.;

Letter dated January 28, 1888; Thos. J. Fisher & Co. to Francis Winslow;

44 Letter dated October 8, 1892; Thos. J. Fisher & Co. to Francis Winslow;

Letter dated October 12, 1892; Thos. J. Fisher & Co. to Francis Winslow;

Letter dated October 15, 1892; F. Winslow to Thos. J. Fisher & Co.;

Letter dated October 17, 1892; Thos. J. Fisher & Co. to Francis Winslow;

Letter dated October 17, 1892; Thos. J. Fisher & Co. to W. N. Bolling;

Telegram dated October 18 (no year given); Thos. J. Fisher & Co. to W. N. Bolling;

Letter dated February 15, 1898; Hamilton & Colbert to Thos. J. Fisher & Co.;

Letter dated February 16, 1898; Thos. J. Fisher & Co. to Hamilton & Colbert;

Letter dated February 17 (no year given); Eliza W. Patterson to Mr. Stellwagen; and

Letter dated February 19, 1898; Thos. J. Fisher & Co. to Eliza W. Patterson.

NOTE.—And the same are herewith filed in evidence, respectively marked Exhibits A. H. Nos. 39 to 52, inclusive. See page- 58 to 65 of this record.

Q. Have you, Mr. Stellwagen, any personal knowledge of the matters and things referred to in the correspondence, outside of those letters just given in evidence?

A. None whatever.

Q. Had you any personal knowledge of the endorsement, "Pay to the order of the Riggs national bank, Francis Winslow, trustee, per Thos. J. Fisher & Co., attorney," on the back of this voucher made payable to the order of Francis Winslow, trustee, and given in evidence here as Exhibit A. H. No. 7?

A. Nothing further than that is the endorsement of my firm, and the further information that our cash books discloses the fact that it was passed to the credit of Eliza W. Patte-son on the 16th of February, 1897; that information I got from the books of our firm and not from my personal knowledge.

Q. It was passed to the credit of whom, do you say?

A. It was passed to the credit of Francis Winslow, trustee, and

subsequently, three days thereafter, it was deposited to the credit of Eliza W. Patterson at the Riggs national bank. I am not sure how that account is opened on the ledger of our firm.

Cross-examination.

By Mr. JOHNSON:

Q. This endorsement on this voucher, "Pay to the order of the Riggs national bank, Francis Winslow, trustee, per Thos. J. Fisher & Co., attorney," was that made by you or by some other member of your firm?

45 A. It was made by Mr. Thomas M. Gale, a member of our firm.

Q. Do you know of your firm having made any other endorsement on any order to pay money which was drawn to the order of Francis Winslow?

A. I have no recollection as to how payments to us may have been drawn. At that time we were collecting rent generally from the property of this estate, but not for this particular property.

Q. Do you know of your firm ever having endorsed in a similar manner any draft, check, or order, or other instrument, for payment to Francis Winslow?

A. I have no knowledge of that either way.

Q. Did you ever have from Mr. Francis Winslow at any time, as far as you personally know, any express authority, written or oral, to make any such endorsement?

A. Well, I will have to answer that, probably, in this way: that we were collecting what rents were collected here in the District of this estate for Messrs. Cox, Jay, and Winslow, trustees, and we paid the proceeds over to Mrs. Eliza W. Patterson monthly, or at whatever time they were collected, but not the rents from this particular piece of property. Now, that authority was a general authority that had been exercised for a long number of years without question. I do not know that we have any written authority for us to do it, but we simply went on and did it. As to this particular draft or voucher, Exhibit A. H. No. 7, I have no personal knowledge; as matter of fact, I was ill at home at the time; but if I had been there and requested to do this, Mr. Winslow being out of the country, I would have felt that I had authority enough to collect that money for the beneficiary, Mrs. Eliza W. Patterson, as we had collected the rents of the estate for her.

Q. The question is, as far as your personal knowledge goes, did your firm ever have any specific authority, oral or written, to endorse the name of Francis Winslow on any check, draft, or other order for the payment of money?

A. None but in the way I have just stated.

Q. As I understand, then, you thought the general authority of your firm, which had been previously and continuously exercised in the matter of the collection of rents of the Patterson estate, would, under the conditions then existing, have justified your firm in doing as was done in this instance?

A. Yes.

Q. And that is, as far as you personally know, the only theory on which it would have been done?

A. Yes.

Redirect.

By Mr. HAMILTON:

Q. You have been engaged in the real-estate business in this city for a number of years?

46 A. For about twenty-five years.

Q. Are you acquainted with lots 9, 10, 11, and 12, square 710, in this city?

A. I am.

Q. Will you state what, in your opinion, is the fair value of that property?

A. Taking it in its entirety, I should say it was worth from sixty-five cents to seventy-five cents per square foot.

Q. Have you any knowledge of its rental value?

A. I have not.

EDWARD J. STELLWAGEN.

Subscribed and sworn to before me this 14th day of November, 1900.

ALBERT HARPER, *Examiner.*

GEORGE E. HAMILTON, of solicitors for the complainant, states as follows:

I am one of the attorneys for the Baltimore & Ohio Railroad Company.

In the latter part of January or the 1st of February, 1898, a letter from Mrs. Eliza W. Patterson, asking that there should be no delay in the payment of the rent for her property, which is involved in this controversy, was referred to me, with a statement that the Baltimore & Ohio Railroad Company had been informed that there had been some change in the trusteeship of the Patterson estate, and asking how this draft or voucher, Exhibit A. H. No 7, should be made. Knowing that Thomas J. Fisher & Co., of this city, had some connection with the Patterson estate, I applied to them for information and was informed that Judge Cox was no longer an active trustee; that Mr. Francis Winslow, one of the trustees, was in Nicaragua, and that Mr. Augustus Jay, the other trustee, was in Paris. I was informed, also, by Thos. J. Fisher & Co. that they had heard from Mrs. Eliza W. Patterson in regard to getting this money, and that they were willing, if the voucher was made to Francis Winslow, trustee, to endorse it as agents of such trustees and pass the money to the credit of Mrs. Eliza W. Patterson in her account. I reported this to the Baltimore office of the Baltimore & Ohio Railroad Company, and the draft or voucher (Exhibit A. H. No. 7) was sent to me by Mr. Neal, then treasurer of that company, in a letter to our firm under date of February 14, 1898, for the purpose of having it

delivered to Thos. J. Fisher & Co., and this was accordingly done by me.

At the time I did this I had no knowledge that there was any serious difficulty or contention about the renewal of the lease. All communication after the return to us of the lease that we had sent to Mr. Winslow in the preceding summer had been conducted between Mr. Winslow and the real-estate agent in Baltimore of the Baltimore & Ohio Railroad Company, and it was not, I think, until the following spring, when I knew of the return of Mr.
47 Winslow to this country, that I was informed that there was a controversy over this question.

GEO. E. HAMILTON.

Subscribed and sworn to before me this 14th day of November, 1900.

ALBERT HARPER, *Examiner.*

Mr. HAMILTON: Solicitors for complainant here give in evidence this letter of Mr. Neal, just referred —.

NOTE.—And the same is herewith filed in evidence, marked Exhibit A. H. No. 53. See page 65 of this record.

(Adjourned to November 16, 1900, Friday, 10 a. m.)

NOVEMBER 20, 1900—Tuesday, 10 o'clock a. m.

Met pursuant to agreement.

Appearances: George E. Hamilton, Esq., of solicitors for the complainant; William G. Johnson, Esq., of solicitors for the defendants; also the examiner, and—

JOHN D. MCCUBBIN, JR., who, being recalled as a witness of lawful age for and on behalf of the complainant, further deposes and says:

Direct examination.

By Mr. HAMILTON:

Q. From the year 1888 to the year 1900 what was the financial condition of the Baltimore & Ohio Railroad Company?

A. From 1888 to 1896 it was fairly good. Then it went into the hands of receivers, and after that time, so far as ability to raise money was concerned, it was in a better condition than preceding that time.

Q. From 1896 what was its financial condition?

A. Very good.

Q. When did the Baltimore and Ohio Railroad Company go into the hands of receivers?

A. In February, I think, or March, 1896; I do not remember the exact date.

Q. When were the receivers discharged?

A. The 30th of June, 1899.

Q. From along about the year 1894 or 1895 did the Baltimore & Ohio Railroad Company expend any money in the purchase of property in the District of Columbia?

A. Yes; I am not clear as to dates, but in the past few years the Baltimore & Ohio Railroad Company has expended about a million of dollars in purchasing property for a depot site and a new line of road into the city of Washington.

Q. For permanent improvements and readjustment of its lines in the city of Washington?

A. Yes, sir; readjustment of its lines—of the terminal.

48 Q. Would the purposes of readjustment of the lines of the Baltimore & Ohio Railroad Company in the city of Washington affect the tracks of the company over the property in controversy here?

A. Yes; upon the construction of the proposed line the line over the Patterson property would be abandoned, and it was for that reason I preferred to make a lease rather than purchase the property; although the company has always been in a position to make a purchase of this property, while I did not actually have the appropriation in hand, I could have raised the money at any time on two or three days' notice.

Cross-examination.

By Mr. JOHNSON:

Q. The method of payment of rent since the Baltimore & Ohio Railroad Company has been a tenant of the property in controversy in this suit was by orders from one department of the company upon another?

A. Yes.

Q. And those orders were made payable to the trustees for the time being named in the lease?

A. Such is my recollection.

J. D. McCUBBIN, JR.

Subscribed and sworn to before me this 20th day of November, 1900.

ALBERT HARPER, *Examiner.*

WILLIAM B. TURPIN, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HAMILTON:

Q. You are a member of the real-estate firm of Plant & Turpin, in this city?

A. I am.

Q. How long have you been a real-estate agent operating in this *suit?*

A. For twelve years.

Q. In the conduct of your business have you had occasion to rent unimproved real property in this city?

A. I have.

Q. Are you acquainted with lots 9, 10, 11, and 12, square 710, in this city?

A. Only in a general way.

Q. Is there among real-estate brokers in this city any accepted rule of values to be derived from the rental of unimproved real property?

A. No, sir; the rule in such cases is to get all you can and get what you can.

49 Q. In your experience as a real-estate agent, do you know of any regulation that covers values in renting unimproved real property?

A. It has always been my rule to try to get as close to five per cent. on the fair value of property as I can get.

Q. Does that include payment of taxes?

A. That includes payment of taxes; that is, the rental on a five per cent. basis would throw the payment of taxes on the owner of the property.

Q. And you have handled a good deal of unimproved real property?

A. Yes, sir; that is, several pieces. The rental of unimproved real property is not a frequent thing, and none of us get as much of it as we would like.

Cross-examination.

By Mr. JOHNSON:

Q. The rental value of unimproved real property would be materially affected by its location and the use it is to be put to, would it not?

A. Oh, yes—I do not know about the use it is to be put to. Its location, of course, would increase its value, and the five per cent. basis I have spoken of, of course, would raise the rent.

Q. If a piece of unimproved real property was so situated that it was peculiarly adapted to some very important and valuable business and was the only property that could be utilized for that purpose, it would have a greater value than if it were a piece of property that had to be rented to anybody for whatever could be done with it?

A. It would have a greater selling value.

Q. How about the rental value?

A. I do not know that it would have a greater rental value, because unimproved real property which can be used for certain purposes is worth only so much on the market.

Q. Do you think that a piece of unimproved real property which lay on navigable water, and being the only landing place for vessels, would not have a greater rental value by reason of that fact than a piece of waste land somewhere in the body of the city?

A. I think my former answer covers that question. That ground would be valuable in its rental on a five per cent. basis, and that would carry you out well.

Q. Then, it would not make any difference what the ground was worth if you only got five per cent. gross?

A. I think I would be satisfied as a real-estate agent and broker with that.

WM. B. TURPIN.

Subscribed and sworn to before me this 20th day of November, 1900.

ALBERT HARPER, *Examiner.*

50 NOTE.—It is here stipulated and agreed between counsel that the area of the four lots in controversy is 41,975 square feet.

ALBERT HARPER, *Examiner.*

NOTE.—It is further stipulated and agreed between counsel that Complainant's Exhibit No. 7 to the bill of complaint in this cause is a true copy of the receipt by Messrs. Carlisle and Johnson, attorneys for trustee, to the Baltimore & Ohio Railroad Company, under date of January 5, 1900, for $1,133.31, paid on account of rents, etc., and that said exhibit may be referred to and considered in evidence in this cause.

Mr. JOHNSON: Solicitors for the defendants here give in evidence certified copy of the last will and testament of Catherine Pearson, deceased, being Defendants' Exhibit No. 2 to the answer of the defendants to the bill of complaint in this cause.

And also certified copy of decree passed June 13, 1892, in equity cause No. 13707, of Cox, trustee, *vs.* Patterson *et al.*, supreme court, District of Columbia, relieving Judge Cox from the office of trustee, being Defendants' Exhibit No. 3 to the answer of defendants to the bill of complaint in this cause.

NOTE.—And it is further stipulated and agreed between counsel that Defendants' Exhibit No. 4 to the answer of defendants in this cause is a true copy of the draft of lease submitted by counsel for the complainant to the defendant Francis Winslow for execution in 1897, and that said exhibit may be referred to and considered in evidence in this cause.

And thereupon solicitors for complainant and for the defendants respectively announce the testimony in this cause closed.

ALBERT HARPER, *Examiner.*

APPENDIX OF EXHIBITS.

EXHIBIT A. H. No. 1.

HOT SPRINGS, VA., *Aug.* 8, '97.

Mr. J. D. McCubbin, ag't, Baltimore, Md.

DEAR SIR: Your letter of the 4th inst. has been forwarded to me at this place.

I am no longer one of the trustees of Mrs. Patterson. Mr. Winslow attends to her affairs. Mr. Jay is in Europe. Mr. Winslow's

address is Newbern, N. C.; but he is somewhere at the North, I believe, at this time. I suppose that a letter addressed to him at Newbern will reach him at some time, and there will be no difficulty about the renewal of the lease.

Y'rs, &c., WALTER S. COX,
1636 *I St., Wash'n.*

(Stamped: Office of the real-estate agent B. & O. R. R., Aug. 10, 1897.)

51 EXHIBIT A. H. No. 2.

John K. Cowen and Oscar G. Murray, receivers Baltimore and Ohio railroad.

Office of real-estate agent.

BALTIMORE, MD., *August 10th*, 1897.

Walter S. Cox, Francis Winslow, and Augustus Jay, trustees of Mrs. Eliza Patterson.

GENTLEMEN: I beg to notify you that the Baltimore and Ohio Railroad Company desires to renew for a further term of five (5) years the lease dated October 17th, 1892, between Walter S. Cox, Francis Winslow, and Augustus Jay, trustees of Mrs. Eliza Patterson, of the first part, and the Baltimore and Ohio Railroad Company, of the second part, of all those lots of ground in the city of Washington, District of Columbia, known as lots numbered nine, ten, eleven, and twelve, in square numbered seven hundred and ten.

Very truly yours, J. D. McCUBBIN, JR., *Agent.*

Sent to Francis Winslow, Newbern, N. C.

EXHIBIT A. H. No. 3.

WASHINGTON, D. C., *Sept.* 27, 1897.

To the Baltimore & Ohio R. R. Co., Baltimore, Md.

GENTLEMEN: In reply to your letter in relation to the renewal of the lease of the lots in square 710 of this city, I beg to say that we are now prepared to convey the property with a perfect title, and prefer executing such conveyance to renewal of the lease.

Very truly yours, FRANCIS WINSLOW, *Trustee.*

EXHIBIT A. H. No. 4.

John K. Cowen and Oscar G. Murray, receivers Baltimore and Ohio railroad.

Office of real-estate agent, Baltimore, Md.

Subject: Lease from Walter S. Cox *et al.*, trustees, lots 9, 10, 11, and 12, square 710, Washington, D. C.

JULY 31, 1897.

Messrs. Hamilton and Colbert, 512 F street N. W., Washington, D. C.

GENTLEMEN: I enclose copy of above lease and certain correspondence.

While the lease provides for the privilege of renewing the same, three months after receipt of a notice from the lessor, it occurs to me that, on account of the possibility of a notice not reach-
52 ing this office, it would be well to provide for the renewal of the lease.

Will you kindly arrange and oblige?

Very truly yours, J. D. McCUBBIN, JR.

EXHIBIT A. H. No. 5.

John K. Cowen and Oscar G. Murray, receivers Baltimore & Ohio railroad.

Office of real-estate agent.

BALTIMORE, MD., *August 4th*, 1897.

Messrs. Hamilton & Colbert, counsel, Washington.

GENTLEMEN: I have sent notice (copy attached) to Mr. Francis Winslow, care Thomas J. Fisher, 1324 F street northwest, Washington, D. C. Will you kindly prepare a new lease and arrange for its execution? The present lease provides for a conveyance to the Baltimore & Ohio Railroad Company, but as the company may desire to have this property conveyed to the Real Estate and Improvement Company, I would suggest that you insert clause covering that point.

We are trying to reduce all six per cent. rentals by borrowing at a lower rate of interest, and by having the lease provide for a conveyance to the Real Estate and Improvement Company we would avoid the necessity for a release from the trustees of the B. & O. general mortgage.

Very truly yours, J. D. McCUBBIN, JR.

EXHIBIT A. H. No. 6.

This agreement, made this 17th day of October, in the year eighteen hundred and ninety-two, between Walter S. Cox, Francis Winslow and Augustus Jay, trustees of Mrs. Eliza Patterson, of the first part, and the Baltimore and Ohio Railroad Company, of the second part,

Witnesseth, that the said parties of the first part, in consideration of the rents hereinafter reserved, do hereby demise, lease and to farm-let, unto the said party of the second part all those lots of ground in the city of Washington, in the District of Columbia, known as lots numbered nine (9), ten (10), eleven (11), and twelve (12), in square numbered seven hundred and ten (710), containing about forty-one thousand nine hundred and seventy-five square feet.

To have and to hold to the said party of the second part, its successors and assigns, for the full term of five years from the first day of August eighteen hundred and ninety-two, yielding and paying therefor yearly, and for every year the sum of seven hundred and fifty-five $\frac{55}{100}$ dollars. And the said parties of the first part hereby agree to and with the said party of the second part that at any time during the term aforesaid, on payment to them by
53 said party of the second part of the sum of twelve thousand five hundred and ninety-two dollars, they will convey the premises aforesaid to said party of the second part, its successors and assigns—(memorandum attached:) or to the Real Estate and Imp. Co. of D. C. or such other person or body corporate as said railroad company may designate and request—) by a good and sufficient deed in fee-simple with all the title and estate therein of the said parties of the first part; and, further, that at or before the expiration of the term aforesaid, at the request of the said party of the second part, its successors and assigns, they will renew the lease with the same agreements and privileges as herein contained for another term of five years or until such time as the said parties of the first part shall be prepared to convey the said premises as hereinbefore agreed with the perfect title in fee-simple thereto, and in case said party of the second part shall omit to make said request, at or before the expiration of said term, the said party of the first part is required to notify said party of the second part of the expiration of the said term, and require it to exercise its election to renew said lease, and the privilege of renewing the same as aforesaid shall continue for three months after such notice.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, and the party of the second part has caused its corporate name to be hereunto subscribed by Orland Smith, its vice-president, and its corporate seal to be hereunto affixed, on the day and year first above written.

—— ——. [SEAL.]

(S'd) FRANCIS WINSLOW,
Trustee. [SEAL.]

Witness:
HERMAN E. GASCH,
As to F. W.

—— ——. [SEAL.]
THE BALTIMORE & OHIO
RAILROAD CO.,
By —— ——, *Vice-President.*

Attest: —— ——, *Secretary.*

54 EXHIBIT A. H. No. 7.

Form A. D. 604.

John K. Cowen and Oscar G. Murray, receivers.

The Baltimore and Ohio Railroad Co. to Francis Winslow, trustee of Eliza W. Patterson, Dr.

Real-estate department; dep't No., 2405; month of January, 1898.

Address: c/o Eliza W. Patterson, 1321 18th St. N. W., Washington, D. C.

Date of bill.

Feb'y 1st. For six months' ground rent of lots Nos. 9, 10, 11, & 12, square 710, Washington, D. C., being from August 1st, 1897, to Feb'y 1st, 1898..... $377 77

W. N. B.

Approved for the receivers.
OSCAR G. MURRAY.
WILD.

Approved.
J. D. McCUBBIN, JR.,
Real-estate Agent.

Approved.
M. N. GREENE,
Gen'l Mgr.

Approved for payment.
G. W. BOOTH,
General Auditor.

$377.77. BALTIMORE, MD., *Jan.* 29, 1898.

Pay to the order of Francis Winslow, trustee of Eliza W. Patterson, three hundred & seventy-seven & $\frac{77}{100}$ dollars, in full settlement of the above audited voucher.

A. F. DUNLEY,
Auditor of Disbursements.

To W. H. Ijams, treasurer Baltimore & Ohio railroad, Baltimore, Md.

(Written across the face:) For receivers.
(Written across the face in red ink:) Accepted. Payable at Citizens' national bank, Baltimore, Md., when properly endorsed. W. H. Ijams, treasurer.

(On the back.)

Audit No. 24795.

The Baltimore and Ohio Railroad Co., real-estate department, month of January, 1898. $377.77, favor of Francis Winslow, trustee

of Eliza W. Patterson. c/o Eliza W. Patterson, 1321 18th St. N. W., Washington, D. C.

Treasurer's charge. Accounts payable.

Examined and passed Apr. 5, 1898.

A. L. DUNHAM,
Special Master.

C[1].
E. T. Feb. 16, 1898.
Jan. 29, 1898.
Receivers B. & O. R. R. Co., aud'r of disb'ts' office, Jan. 29, 1898. Voucher issued.

55 All endorsements to be made on this side.

Pay to the order of the Riggs national bank.
FRANCIS WINSLOW, *Trustee*,
Per THOS. J. FISHER & CO., *Attorney*.

The Riggs national bank of Washington, D. C. Endorsement guaranteed.

Pay Nat'l Bank of Baltimore or order.
THE RIGGS NATIONAL BANK OF WASHINGTON, D. C.
A. T. BRICE, *Cashier*.

Rec'd payment.
H. H. O'CONNELL, *Cashier*.

Treasurer for receivers B. & O. R. R. Paid Feb. 17, 1898.

Received payment.
J. THOS. SMITH, *Cashier*.

EXHIBIT A. H. No. 8.

1321 18TH ST., WEST WASHINGTON, *Jan'y 12th*, '98.

Mr. Ijams, treasurer of Balto. & Ohio R. R. Co.:

I will thank you to send me the rent due the first of Feb'y (semi-annual payment) for the use of my property on 1st Str., Washington, N. W., as early as possible after it is due. Mr. Winslow, one of the trustees, is away, but Judge Walter Cox will sign the receipt.

Yours truly, ELIZA W. PATTERSON.

(Stamped: Receivers B. & O. R. R. Co., auditor's office, Jan. 29, 1898. Voucher issued. 24795.)

EXHIBIT A. H. No. 9.

1321 18TH ST., WASHINGTON, *Jan'y 27th*.

Mr. Ijams.

DEAR SIR: Will you be so kind as to send me the check, $377.77, semi-annual rent for my property occupied by the Balto. & Ohio

R. R., due Feb'y 1st, 1899, directed to me, 1321 18th St., Washington, and oblige?

Yours truly, ELIZA W. PATTERSON.

EXHIBIT A. H. No. 10.

1321 18TH ST., WASHINGTON, *Feby 3rd*, 1898.

Mr. Ijams.

DEAR SIR: I sent back to you the draft that you sent me on the 28th Jan'y, of $377.77, from Baltimore & Ohio R. R. Co. for rent due me. The draft was made out to Mr. Francis Winslow, trustee.
56 You have always heretofore made out the draft either to me or all three trustees. In writing you I told you that Mr. Francis Winslow was at present in Nicaragua, and I could not send the draft to him for his signature, and therefore I could not draw the money. I therefore returned the draft to you, requesting that have it made out to Cox, Jay & Winslow. Judge Cox & Mr. Jay will sign it and I can get the money.

I hope you got the draft all right. I sent it to you on the 1st Feb'y. Hoping I will hear from you soon, I remain,

Yours truly, ELIZA W. PATTERSON.

EXHIBIT A. H. No. 11.

1321 18TH ST., WASHINGTON, *Feb'y 5th*, 1898.

Mr. Ijams.

DEAR SIR: I returned to you a few days ago the draft which you sent me for the rent of my property on First St., Washington, by the railroad company of Balto. & Ohio of $377.77. The draft was made out to Mr. Francis Winslow, trustee, and I could not draw it, as Mr. Winslow is in Nicaragua, and I could not send it so far away to him, fearing it might be lost. I therefore returned it to you, with the request that you would sign it, as you always have done heretofore, Cox, Jay & Winslow, trustees. Judge Cox & Mr. Jay are both here, so that they can sign it at once and I can have the money.

By giving prompt attention to this small matter of business you will greatly oblige,

Yours truly, ELIZA W. PATTERSON.

EXHIBIT A. H. No. 12.

John K. Cowen and Oscar G. Murray, receivers.

Treasurer's office, Baltimore and Ohio railroad.

F. H. H.—"B." BALTIMORE, MD., *January* 20, 1899.

Mr. Francis Winslow, trustee for Eliza W. Patterson, Newberne, N. C.

DEAR SIR: We remitted to you on August 12, 1898, to Newberne, N. C., our voucher No. 960 for $377.77. Kindly advise if you have

received this voucher, as our record show- the voucher is still unpaid.

Yours truly,

W. H. IJAMS,
R.,
Treasurer.

57 EXHIBIT A. H. No. 13.

NEW MILFORD, CONN., *January 25th*, 1899.

Mr. J. D. McCubbin, Jr., Baltimore & Ohio building, Baltimore, Md.

MY DEAR MR. MCCUBBIN: I have received from Carlisle & Johnson their opinion as to the status of the lots in square 710. Briefly, they hold that the old lease is inoperative, first, because it was never properly executed, and, second, no matter how executed, it lapsed in August, 1897. The result is, as expressed by them, that the road is a tenant by sufferance, and the tenancy can be terminated by ordinary process in a magistrate's court.

As I explained to you, I have no disposition to do anything adverse to the interests of the road, but I hope the company will understand my position as a trustee: I will be very glad to assist, as far as my influence goes, in making a lease for the future upon equitable terms, or if the road prefers to purchase, we will very willingly consider any proposition that they may make, either for the lots or the whole square.

Yours very truly,

FRANCIS WINSLOW.

EXHIBIT A. H. No. 14.

John K. Cowen and Oscar G. Murray, receivers Baltimore and Ohio railroad.

Office of real-estate agent.

BALTIMORE, MD., *February 28th*, 1899.
Jan'y (?)

Francis Winslow, Esq., New Milford, Conn.

DEAR SIR: I beg to acknowledge receipt of your favor of the 25th instant, and note that your counsel claims that the railroad company is a tenant by sufferance, etc., etc.

On the other hand, our counsel advises me that we have the right to tender the money and demand a deed, but as I do not have an appropriation for this particulrr purchase, we prefer to arrange a lease, say, for two years, with the privilege of another year, at the same rental as the present lease, leaving out, if you prefer, the option to purchase.

This will tide us over until after the reorganization, when we will be in better shape to arrange for the purchase of the lot, if it is found to be necessary for our purposes.

Very truly yours,

J. D. McCUBBIN, JR.

EXHIBIT A. H. No. 15.

NEW MILFORD, CONN., *January* 31*st*, 1899.

Mr. W. H. Ijams, treas. B. & O. R. R., Baltimore, Md.

DEAR SIR: I am in receipt of your letter of January 20th in relation to the voucher for rent for the premises in Washington.
58 The voucher was received, but, pending advice of counsel, no action was taken in regard to it.

I am advised that the company are and for some time have been only tenants at sufferance, and I have notified Mr. McCubbin of that fact and invited a proposition from the company.

Pending a more definite arrangement that now exists, I do not feel justified in accepting payments without the company's full understanding of my position, and have therefore suspended action on the voucher.

Yours very truly, FRANCIS WINSLOW, *Trustee.*

EXHIBIT A. H. No. 16.

NEW MILFORD, CONN., *Feb.* 15*th*, 1899.

J. D. McCubbin, Esq., real-estate agent B. & O. R. R., Balto., Md.

DEAR SIR: I am in receipt of your letter of the 28th ult., containing proposition to lease the lots in square 710, Wash'n, and beg to say that I do not feel justified in accepting it.

We prefer to sell the property rather than lease it, but neither in case of sale or lease could we be governed by conditions or prices existing some twenty-five years ago.

As this matter has been pending now something over a year and a half, I will be much obliged if the company will come to some definite conclusion with regard to it.

Yours very truly, FRANCIS WINSLOW.

EXHIBIT A. H. No. 17.

John K. Cowen and Oscar G. Murray, receivers Baltimore and Ohio railroad.

Office of real-estate agent.

BALTIMORE, MD., *April* 18, 1899.

Mr. Francis Winslow, New Milford, Conn.

DEAR SIR: Replying to your letter of the 11th instant to Mr. J. D. McCubbin, Jr., I beg to advise that Mr. McCubbin has been away from town since receipt of your letter. He is expected back the first of next week, when it will be brought to his attention.

Very truly yours, C. H. MORAN.

59 EXHIBIT A. H. No. 18.

John K. Cowen and Oscar G. Murray, receivers Baltimore and Ohio railroad.

Office of real-estate agent.

BALTIMORE, MD., *April* 21, 1899.

Francis Winslow, Esq., trustee, New Milford, Conn.

DEAR SIR: Continued absence has prevented me from answering your letter of March 11, 1899. I have again submitted the questions involved to our law department, and am advised that, in the opinion of our counsel, the Baltimore & Ohio Railroad Company has the right to exercise the right given it under the agreement of October 17, 1892, to purchase the lots in square 710, Washington, D. C.

The Baltimore & Ohio Railroad Company is now ready to pay the sum of $12,592.00, the purchase price named in said agreement, and all rent due up to the date of transfer, and now offers to pay said sum upon the execution and delivery to it of a proper deed for the property. Will you please inform me if you are willing to accept said sum and convey the property? The Baltimore and Ohio Railroad Company is ready to accept a deed and pay the purchase-money at any time and place you may appoint.

Very truly yours, J. D. McCUBBIN, JR., *Agent.*

EXHIBIT A. H. No. 19.

NEW MILFORD, CONN., *April* 27, 1899.

Mr. J. D. McCubbin, Jr., c/o Baltimore & Ohio R. R. office, Baltimore, Md.

DEAR SIR: I am in receipt of your letter of April 21st, containing an offer of $12,592.00 by the company for the lots in square 710, and beg to say that we decline the proposition made.

While your letter of the 21st inst. does not definitely say so, I presume it to mean that the company declines both the propositions made in my letter of March 11th, and unless I hear from you to the contrary will consider such to be the fact.

I will be obliged if you will advise me as to what action you now suggest in the premises.

Very truly yours, FRANCIS WINSLOW.

EXHIBIT A. H. No. 20.

1446 N ST. WASHINGTON, *Aug. 4th*, 1884.

Treasurer of the Balt. & Ohio Railroad Company.

DEAR SIR: Will you please enclose the check for the semi-annual interest on the lease you have on my property in this city to my present address, 1446 N St. N. W., and oblige,

Yours truly, ELIZA W. PATTERSON,
Heir of the Estate of Catharine Pearson.

60 (Stamped: Baltimore & Ohio R. R. Co., auditor's office, Aug. 8, 1884. Warrant issued.) 15454.
$377.77, six months' ground rent, Wash'n. W. H. Ijams, treas.

EXHIBIT A. H. No. 21.

1446 N ST., *Feb'y 17th*, 1886.

Mr. Ijams, treasurer of B. & O. R. R. Co.:

Mrs. E. W. Patterson respectfully requests that the semi-annual interest due on the lease of her property to the B. & O. R. R. Co. on the 18th Feb'y, 1886, shall be paid at your earliest convenience and check remitted to her at her present residence, 1446 N Str. N. W., Washington city, D. C.

This property belongs to the estate of Catharine Pearson, of which Mrs. E. W. Patterson is the heir.

(Stamped: Baltimore & Ohio R. R. Co., auditor of disb'ts' office, Feb. 19, 1886. Voucher issued.) 17288.

EXHIBIT A. H. No. 22.

MAGNOLIA, MASS., *July 5th*, 1886.

Mrs. E. W. Patterson will be obliged to the treasurer of the Balt. & Ohio R. R. Company if he will have the check for the payment of the semi-annual interest upon the lease of her property sent to her at this place, care of Mr. Roberts, Sea View cottage, Magnolia, Mass.

(Stamped: Baltimore & Ohio R. R. Co., auditor of disb'ts' office, Aug. 7, 1886. Voucher issued.) 39021.

Last payment, Feb'y 19, '86, for 6 mo. ending Feb'y 1, '86. Rec'd, #17288, $377.77.
W. H. Ijams, tr., $377.77, due 1 Aug., '86.
Paid by check No. 1786, 3rd, N. Y.

N. S. PENDLETON.

EXHIBIT A. H. No. 23.

ASHEVILLE, *July 21st*, 1886.

Mr. Ijams.

DEAR SIR: Will you be so kind to send to me to my present address, Asheville, North Carolina, the check for the semi-annual payment of ground rent of my property leased to the Balt. & Ohio R. R. Company, due the first of August, 1887, & oblige,

Yours truly, ELIZA W. PATTERSON.

Mr. Ijams, treasurer of Balto. & Ohio R. R. Co., Baltimore, Md.

W. H. Ijams, tr., $377.77. Citizens' check No. 104,052.
(Stamped: Baltimore & Ohio R. R. Co., auditor of disb'ts' office, Aug. 3, 1887. Voucher issued. 50265.)

61 EXHIBIT A. H. No. 24.

WASHINGTON, *Feb'y 1st*, 1887.

Mrs. Patterson presents her compliments to the treasurer of the Balt. & Ohio R. R. Company, and requests that he will forward to her the semi-annual payment for the ground rent of her property occupied by the Metropolitan branch of that road, now due.

MRS. CARLISLE P. PATTERSON,
1446 *N St. N. W.*

Last payment, August 7, 1886, for 6 mos. ending July 1, '86.
Rec'd, #39021, $377.77.
$377.77. W. H. Ijams, tr. Citizens' check No. 101,120.

(Stamped: Baltimore & Ohio R. R. Co., auditor of disb'ts' office, Feb. 2, 1887. Voucher issued. 19235.)

EXHIBIT A. H. No. 25.

ASHEVILLE, *Jan'y* 26, 1888.

Mr. Ijams.

SIR: Will you kindly forward the semi-annual payment for the lease of my property, $377.77, to the Balt. & Ohio R. R. Company, due Feb'y 1st, to me at this place, Asheville, North Carolina, where I am residing at present, & oblige,

Yours respectfully, ELIZA W. PATTERSON.

W. H. Ijams, tr., Washington, D. C. Citizens' check #107,402.

(Stamped: Baltimore & Ohio R. R. Co., auditor of disb'ts' office, Feb. 1, 1888. Voucher issued. 16008.)

EXHIBIT A. H. No. 26.

ASHEVILLE, *August 1st*, 1888.

Mr. Ijams.

SIR: Will you please to send the check $377.77, ground rent, for property lease to Balto. & Ohio Railroad Company, due August 1st, to me to this place, Asheville, North Carolina, Buncombe Co., and oblige,

Yours respectfully, ELIZA W. PATTERSON.

W. H. Ijams, tr., Washington, D. C., estate of Catharine Pearson. Citz. check #110,742.

(Stamped: Baltimore & Ohio R. R. Co., auditor of disb'ts' office, Aug. 3, 1888. Voucher issued. 39410.)

62 EXHIBIT A. H. No. 27

JAMESTOWN, *July 15th*, 1889.

Mr. Ijams:

I am now at Jamestown, Rhode Island, and will thank you to have the semi-annual payment of ground rent due Aug. 1st by the Balt. & Ohio Company for my property on 1st Str. northeast, Washington, D. C., $377.77, forwarded to me at this place, care of Mrs. Tenant, box H, P. O.

Yours respectfully, ELIZA W. PATTERSON,
Heir of the Estate of Catharine Pearson, Deceased.

Last payment, Feb. 5, '89, for 6 mos. ending Feb. 1, '89. Rec., 15081, $377.77.

(Stamped: Auditor of disbursements, B. & O. R. R. Co., Jul- 19, 1889. Baltimore & Ohio R. R. Co., auditor of disb'ts' office, Aug. ', 1889. Voucher issued. 34937.)

EXHIBIT A. H. No. 28.

SAN FRANCISCO, CAL., *Jan'y 11th*, 1890.

Mr. Ijams, treasurer of the Baltimore & Ohio R. R. Company:

I will thank you to enclose the check for the payment of the semi-annual interest due Feb'y 1st, 1890, upon property rented from me by the B. & O. R. R. Company, $377.77, to Judge Walter S. Cox, of Washington, one of my trustees, as heir to the estate of Mrs. Catharine Pearson, deceased. The check requires the signature of one of the trustees. I am spending the winter in San Francisco, Cal., and it will be more convenient to have the check sent to him direct rather than to me out here. He will sign it and send the receeipt to you and deposit the check to my credit in Riggs & Co.'s bank, Washington. Hoping that there will be no difficulty about the money for the semi-annual rent being paid promptly, I remain yours,

ELIZA W. PATTERSON.

Please notify me when the payment is made Feb'y 1st, 1890.

Last payment, Aug. 1, '89, for 6 mos. ending Aug. 1, '89. Rec., 34937, $377.77.

(Stamped: Auditor of disbursements B. & O. R. R. Co., Jan. 20, 1890. Baltimore & Ohio R. R. Co., auditor of disb'ts' office, Feb. 1, 1890. Voucher issued. 12662.)

EXHIBIT A. H. No. 29.

JAMESTOWN, RHODE ISLAND, *July 1st*, 1890.

Mr. Ijams.

DEAR SIR: I will thank you to forward to me, Mrs. E. W. Patterson, at this place, Jamestown, R. I., the check for $377.77, the
63 semi-annual rent for property lease from the estate of the late Catharine Pearson, due 1st August, by the Balt. & Ohio R. R.

Company. I will sign the receipt for the same and return it to you, the treasurer of the Balt. & Ohio R. R. Company.

Very truly yours, ELIZA W. PATTERSON.

(Stamped: Baltimore & Ohio R. R. Co., auditor of disb'ts' office Jul- 25, 1890. Voucher issued. 33100.)

EXHIBIT A. H. No. 30.

GERMANY, LANGEN SCHWALBACH, *July 14th*, 1891.

Mr. Ijams, treasurer of Balt. & Ohio R. R. Co.:

Will you please send the check for the semi-annual payment of the rent for the property on 1st Str. N. E., Washing- city, to the estate of Mrs. Catharine Pearson, $377.77, to Lt. Francis Winslow, trustee, for his signature, to Mattapoisett, Mass., and oblige,

Yours truly, ELIZA W. PATTERSON.

(Stamped: Baltimore & Ohio R. R. Co., auditor of disb'ts' office, Aug. 8, 1891. Voucher issued. 38579.)

EXHIBIT A. H. No. 31.

LANGEN SCHWALBACH, GERMANY, *July 13th*, 1892.

Mr. Ijams, treasurer of Balto. & Ohio Railroad Co.

DEAR SIR: I will thank you to send the check for the semi-annual payment of the rent for my property on 1st Str. N. E., Washington, D. C., to Lt. Francis Winslow, trustee, for his signature, to Newberne, North Carolina, $377.77, due August 1st, 1892, and oblige,

Yours truly, ELIZA W. PATTERSON.

(Stamped: Baltimore & Ohio R. R. Co., auditor of disb'ts' office, Aug. 1, 1892. Voucher issued. 4298.)

EXHIBIT A. H. No. 32.

1705 NEW HAMPSHIRE AVENUE, WASHINGTON, D. C.

Mr. Ijams.

DEAR SIR: Will you please to send the check due Feb'y 1st, 1894, for semi-annual rent of my property on 1st Str. N. E. to Balt. & Ohio R. R. Co., to Francis Winslow, Esq., trustee, Newberne, North Carolina, for his signature.

Yours truly, ELIZA W. PATTERSON.

(Stamped: Baltimore & Ohio R. R. Co., auditor of disb'ts' office, Jun- 3, 1893. Voucher issued. 27466.)

64 EXHIBIT A. H. No. 33.

JAMESTOWN, R. I., *Aug.* 21*st*, 1893.

W. N. Bolling, Esq., R. est. dept., B. & O. R. R., Baltimore, Md.

DEAR SIR: Will you please send check for rent of the lots in sq. 710, Wash'n, D. C., due estate of Catharine Pearson, to me at the above address, and oblige,

Yours truly, FRANCIS WINSLOW.

(Stamped: Baltimore & Ohio R. R. Co., auditor of disb'ts' office, Aug. 26, 1893. Voucher issued. 7138.)

EXHIBIT A. H. No. 34.

NORTH HATLEY,
PROVINCE OF QUEBEC, CANADA, *July* 11*th*, 1895.

Mr. Ijams, treasurer of Balt. & Ohio R. R. Company.

DEAR SIR: Will you be so kind as to forward the check for the rent of my property to the Balt. & Ohio R. R. Co. due August 1st, 1895, to me or to my trustee, Lt. Francis Winslow, to this place, care of Mrs. Addie Le Baron, North Hatley, province of Quebec, Canada.

Yours truly, ELIZA W. PATTERSON.

(Stamped: Baltimore & Ohio R. R. Co., auditor of disb'ts' office, Aug. 1, 1895. Voucher issued. 4152.)

EXHIBIT A. H. No. 35.

1321 18TH STR., WASHINGTON, D. C., *Jan'y* 7*th*, 1896.

Treasurer of Balt. & Ohio R. R. Company:

The semi-annual rent for my 1st Str. property will be due Febr'y 1st, 1896. I will be much obliged to you if you will send the draft for the amount, $377.77, to Mr. Francis Winslow, trustee of my mother's estate, Mrs. Catharine Pearson, to Newberne, North Carolina, where he is at present, for his signature.

Yours truly, ELIZA W. PATTERSON.

Mr. W. N. Bolling, R. E. A. Please note treasurer.

(Stamped: Baltimore & Ohio R. R. Co., auditor of disb'ts' office, Feb. 1, 1896. Voucher issued. 28829.)

EXHIBIT A. H. No. 36.

NORTH HATLEY,
PROVINCE OF QUEBEC, CANADA, *July* 15*th*, 1896.

Mr. Ijams, treasurer of Balt. & Ohio R. R.

DEAR SIR: I will thank you to forward to me at my present address, at the head of this note, the check for the interest due
65 me for rent of my property to the Balt. & Ohio R. R. Co., in Washington, D. C., August first—semi-annual rent, $377.77.

Yours truly, ELIZA W. PATTERSON.

Mrs. Eliza W. Patterson, care of Charles Jackson, North Hatley, province of Quebec, Canada. Mr. Francis Winslow, who is here, will sign the check before presenting it to bank for collection. Resp'y referred to Mr. W. N. Bolling, R. E. A., for his information. Ass't treas'r, H. 8, 13, '96.

(Stamped: Receivers B. & O. R. R. Co., aud'r of disb'ts' office, Aug. 21, 1896. Voucher issued. 5080.)

EXHIBIT A. H. No. 37.

1321 18TH STR., WASHINGTON, *Jan'y 9th*, 1897.

Mr. Ijams, treasurer of Balt. & Ohio Railroad Co.

DEAR SIR: The interest upon the money due me by the Balt. & Ohio Railroad Company for the use of my property on 1st Str. east, in Washington, D. C., Feb'y 1st, 1897—I will thank you to send the check to Mr. Francis Winslow, trustee, for his signature—to him at Newberne, North Carolina.

ELIZA W. PATTERSON.

(Stamped: Receivers B. & O. R. R. Co., aud'r of disb'ts' office, Jan. 25, 1897. Voucher issued. 21626.)

EXHIBIT A. H. No. 38.

SANDWICH, MASS., *July 23rd*, 1897.

Mr. Ijams.

DEAR SIR: Will you be so kind as to forward to me at this place the semi-annual rent due Aug. 1st for the use of my property on 1st Str. northwest, in Washington?

Mr. Winslow, trustee, is here with me and will sign the check here. Please address me: Mrs. Eliza W. Patterson, Sandwich, Mass., care of Mrs. Joseph Miller.

Yours truly, ELIZA W. PATTERSON.

For Mr. McCubbin. W. H. I., tr. 7, 26.

(Stamped: Receivers B. & O. R. R. Co., aud'r of disb'ts' office, Aug. 6, 1897. Voucher issued. 3882.)

EXHIBIT A. H. No. 39.

NORFOLK, VA., *Nov.* 18, 1887.

DEAR FISHER: Will you please let one of your clerks, as soon as possible, look over the record books in the record office and see if a lease from Cox, or Cox, Jay, & Winslow, to the B. & O. R. R. is recorded; and, if so, when it expired?

If I am not mistaken, the lease was made in 1881 or 1882,
66 and was for 5 years, with privilege of renewal. I want to make them renew at once, and we are required to give notice of expiration. Please let me know the result of your interview with

Glover. I saw him for a minute, and he appeared dreadfully frightened. Let me know about Hillyer also, and if you have made deposit to my credit, as I may want to draw on it next week. Two days' investigation here is of a very encouraging nature. Address Elizabeth City.

Yours truly, F. WINSLOW.

EXHIBIT A. H. No. 40.

Thomas J. Fisher & Co., real-estate brokers, &c.

WASHINGTON, D. C., *Nov. 23rd*, 1887.

Lieutenant Francis Winslow, U. S. N., Elizabeth City, N. C.

DEAR LIEUT.: Your favor of Nov. 18th dated at Norfolk, Va., duly received.

We have had the records examined and do not find any lease recorded to the B. & O. R. R. Co. We enclose herewith a copy of the original lease, together with a letter from Mr. Bolling, their engineer, under date of Jan. 25th, 1883, which will probably afford all the information you desire on the subject.

Mr. Glover, as well as myself, are very much averse to going into stock speculation, but will deposit $100 each at Riggs & Co.'s, subject to your order, to be used in the preliminary investigation in regard to the oyster fields, the status of which can be determined after the question has been settled whether oysters can be cultivated on the land in question. There will be no difficulty in selecting other desirable parties here who will go into the arrangement as soon as I hear from you.

Very truly yours, THOS. J. FISHER.

EXHIBIT A. H. No. 41.

RALEIGH, N. C., *Jan.* 18, 1888.

Messrs. Thos. J. Fisher & Co., Washington, D. C.

DEAR MR. FISHER: Yours of the 17th has just been rec'd. I think I had better leave the matter of Graham's renewal to you. You can decline or not, using me as authority, as you think most advisable. I suppose there has been no impairment of security.

Will you please let me know whether in executing a lease (to the B. & O. R. R.) it is necessary to acknowledge before a notary public and attach certificate of clerk of court or merely sign?

I guess the R. R. question will not be settled this Congress, either. Am just up here and in a mess of arrears of work.

Yours truly, F. WINSLOW.

67 EXHIBIT A. H. No. 42.

Thomas J. Fisher &. Co., real-estate brokers, &c.

WASHINGTON, D. C., *January 28th*, 1888.

Lieutenant Francis Winslow, U. S. N., care agricultural department, Raleigh, N. C.

DEAR LIEUTENANT: Your favor of the 18th of Jan. was duly received; also the three deeds which were sent us by Mr. Jones, the notary.

In the matter of renewal of the Graham notes, being for small amounts, we notified him that they will have to be paid when due, as it is best to get your funds in larger sums, these notes being under $100.

In executing the lease to the B. & O. we do not think it would be necessary to acknowledge before a notary public, as a signature witnessed is all that is necessary. Still, as railroad people are sometimes very particular about such matters, if you have a notary handy it might be just as well to have him take your acknowledgment.

Very truly yours, THOS. J. FISHER & CO.

EXHIBIT A. H. No. 43.

Thomas J. Fisher & Co., real-estate brokers, &c.

WASHINGTON, D. C., *October 8th*, 1892.

Francis Winslow, Esq., Newberne, N. C.

DEAR SIR: Herewith we hand you duplicate leases with the B. & O. R. R. Co. for lots in square 710. Please execute these leases and return to us and we will forward them to the R. R. Co.

Very truly yours, THOS. J. FISHER & CO.
MALONE.

EXHIBIT A. H. No. 44.

Thomas J. Fisher & Co., real-estate brokers, &c.

WASHINGTON, D. C., *October 12th*, 1892.

Mr. Francis Winslow, Jamestown, Rhode Island.

DEAR SIR: We beg to hand you herewith a letter received by us from Mr. J. Miller, making an offer of $50 per month for the part of square 710 leased by the B. & O. R. R. Co.

* * * (Not legible in press copy book.) * * *

We sent you a few days ago duplicate leases for the portion of this square leased by the B. & O. R. R. Co.

We forwarded these leases to Newberne, North Carolina.

Have you as yet received them?

Very truly yours, THOS. J. FISHER & CO.
MALONE.

Dictated:
J. J. M.

68 EXHIBIT A. H. No. 45.

JAMESTOWN, R. I., *Oct.* 15, 1892.

Messrs. Tho-as J. Fisher & Co.

DEAR SIRS: I enclose B & O. leases. Will you please compare with the original lease and see that they correspond before delivering. I have not a copy at hand, but I suppose Mr. Hamilton has, and if not I think the lease has been recorded.

We do not care to accept Mr. Miller's office, it not being high enough. We will give him a lease for a term of years for $1,200 per an.

Yours truly, F. WINSLOW.

EXHIBIT A. H. No. 46.

Thomas J. Fisher & Co., real-estate brokers, &c.

WASHINGTON, D. C., *October* 17*th*, 1892.

Mr. Francis Winslow, Jamestown, R. I.

DEAR SIR: We beg to acknowledge receipt of your favor of the 15th inst., enclosing duplicate leases with the B. & O. R. R. Co. We will forward same at once.

Yours very truly, THOS. J FISHER & CO.
MALONE.

Dictated:
J. J. M.

EXHIBIT A. H. No. 47.

Thomas J. Fisher & Co., real-estate brokers, &c.

WASHINGTON, D. C., *October* 17*th*, 1892.

Mr. W. N. Bolling, B. & O. R. R. Co., Baltimore, Md.

DEAR SIR: We beg to hand you herewith duplicate leases for lots 9, 10, 11 & 12, square 710, executed by Francis Winslow, Esq. Kindly acknowledge receipt.

Yours very truly, THOS. J. FISHER & CO.
MALONE

Dictated:
J. J. M.

EXHIBIT A. H. No. 48.

Telegram.

WASHINGTON, D. C., 18 *October*, —.

W. N. Bolling, B. and O. R. R., Balto., Md.:

Only Winslow and Jay represent Patterson estate. Cox resigned—no successor appointed—leaving other two to act; Jay's address, sec'y American legation, Paris, France.

THOS. J. FISHER & CO.

69 EXHIBIT A. H. No. 49.

WASHINGTON, D. C., *February* 15, 1898.

Messrs. Thomas J. Fisher & Co.

GENTLEMEN: The enclosed letter from Mr. Neal, assistant treasurer of the B. & O. R. R. Company, together with draft in the Patterson matter, is forwarded to you for your information. Kindly endorse the draft and deposit in your bank for collection.

Yours very truly, HAMILTON & COLBERT.

EXHIBIT A. H. No. 50.

Thomas J. Fisher & Co., real-estate brokers, etc.

WASHINGTON, D. C., *Feb.* 16*th*, 1898.

Messrs. Hamilton & Colbert, 512 F street, city.

GENTLEMEN: We beg to acknowledge the receipt of your favor of the 15th inst. enclosing draft of the B. and O. Railroad Company for $377.77 in payment of rent for lots in square No. 710 for six months from August 1st, 1897, to February 1st, 1898, which amount has been passed to the credit of Mrs. Eliza W. Patterson.

Yours truly, THOS. J. FISHER & CO.

M.

F. P. M.

EXHIBIT A. H. No. 51.

1321 18TH, *Feb'y* 17*th*, —.

Mr. Stellwagen.

DEAR SIR: Mr. Hamilton told me that the check, $377.77, of the Balt. & Ohio R. R. Company for the semi-annual rent for my property on 1st Str. east has been paid to you as agent for Mr. Winslow, to whom the check was made out, &, as he was not here to sign the check, I could not get the money. I do not understand why the check was not made out, as it has always been for years, to the three trustees, so that when one was absent either of the others would sign & I get the money at once. Now that it has been paid to Fisher & Co., agent, to my account, I will thank you to have it placed to my credit in Riggs national bank, so that I can draw upon it without further delay.

Yours truly, ELIZA W. PATTERSON.

EXHIBIT A. H. No. 52.

Thomas J. Fisher & Co., real-estate brokers, &c.

WASHINGTON, D. C., *Feb.* 19*th*, 1898.

Mrs. Eliza W. Patterson, 1321 18th street, city.

DEAR MADAM: Your letter to our Mr. Stellwagen has been received, and, as he is at home sick, we have this day taken the
70 liberty of attending to the matter for you, and herewith

enclose deposit slip on the Riggs national bank for $377.77, amount of the B. and O. Railroad Company's check.

Very truly yours, THOS. J. FISHER & CO.

T. M. G.
1 enc.

EXHIBIT A. H. No. 53.

John K. Cowen and Oscar G. Murray, receivers.

Treasurer's office, Baltimore and Ohio railroad.

C. W. R. "B."

BALTIMORE, MD., *February 14th*, 1898.

Messrs. Hamilton & Colbert, 512 F St. N. W., Washington, D. C.

GENTLEMEN: Your letter of the 9th inst., addressed to Mr. J. D. McCubbin, Jr., real-estate agent, regarding the voucher in favor of Francis Winslow, trustee, has been referred to me by Mr. McCubbin. Following your suggestion, I enclose you herewith the voucher which I will be obliged if you will turn over to Messrs. Thomas J. Fisher & Co., having them indorse it "Francis Winslow, trustee, per Thomas J. Fisher & Co., attorneys," and deposit it in their bank for collection at the Citizens' national bank, Baltimore.

Yours most truly, J. M. NEAL,
Ass't Treasurer.

I hereby certify that the foregoing depositions (comprising sixty-five typewritten pages, together with the appendix of exhibits thereto), were taken down by me in shorthand, as an examiner in chancery, from the statements when and as uttered by the deponents thereof; that the same were thereafter transcribed by me and reduced to typewriting, and thereupon read and subscribed by the respective deponents thereof in my presence.

I further certify that the exhibits in said appendix are true copies made by me from the originals thereof.

I further certify that my fee of $— for taking, certifying, and returning said depositions, with the exhibits thereto, has been paid to me by the complainant.

And I further certify that I am not of counsel nor in anywise interested in this cause.

ALBERT HARPER,
Examiner in Chancery.

71 *Opinion of Justice Barnard.*

Filed Feb. 25, 1901.

In the Supreme Court of the District of Columbia.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Complainant,
vs.
FRANCIS WINSLOW ET AL., Defendants.
} No. 21764. Equity.

Mrs. Catherine Pearson, by her will, executed in 1862, devised certain real estate to three trustees for the sole and separate use of her daughter, Mrs. Eliza W. Patterson, during her life, she to occupy, possess, and use the same and receive all the income therefrom, with power in the trustees to sell and convey any of the estate for the purpose of changing the investment, if she should request the same, in writing signed by her in the presence of a witness and attested by such witness. The trustees on August 1, 1872, a few years after Mrs. Pearson's death, signed a lease of certain vacant lots in square 710 to the complainant company.

These lots contained about 41,975 square feet of ground, and the rental per annum was $755.55, and the lease was for a term of five years, with a privilege of purchase at any time during the term for $12,592 and a right of renewal for another term of five years.

The complainant company took possession of said lots under the said contract, and has remained in possession until the present time and has paid the yearly rental as therein agreed.

No formal renewal appears to have been made of said lease, but on February 1, 1883, the trustees and Mrs. Patterson executed a similar lease to said company for a term of five years from August 1, 1883, with the same privileges of purchase and renewal.

On January 30, 1888, a further lease was signed by the trustees and said company for a term of five years from August 1, 1887, with like privilege of purchase and renewal, but this was not signed by Mrs. Patterson.

No renewal was had of this lease, but October 17, 1892, a similar lease was signed by one of the trustees, although purporting to be made by all three, and containing the same privileges of purchase and renewal and being for a term of five years from August 1, 1892. This lease does not appear to have been signed by the company, but it was acted upon by the company as if it had been signed by it. This lease expired August 1, 1897, but the privilege of renewal, if not exercised during the term by the lessee notifying the lessors of its election to renew, was to extend for three months after notification of the lessee by the lessors of the expiration of the lease.

August 4, 1897, the company's agent wrote to the trustees that said lessee desired to renew the lease for another term of five
72 years. This letter reached Judge Cox, who was one of the original trustees, at Hot Springs, Virginia, and he on August

8, 1897, wrote the agent of the company that he was no longer a trustee, and gave the address of Mr. Winslow, one of the substituted trustees, who was then acting.

On August 10, 1897, the same notice was sent to Mr. Winslow, and on September 27, 1897, he replied that they were then prepared to convey the property with a perfect title, and preferred executing such conveyance to renewal of the lease. No renewal was therefore had and no arrangement made for the purchase, the company preferring to lease at that time, but the same rental was thereafter paid by the company to Mrs. Patterson for a period of six months, by means of a draft to the order of Mr. Winslow, one of the trustees, which was not personally endorsed by such trustee, but by Fisher and Company, who supposed they were authorized to do so, or that their act in so doing would be approved by the said trustee, they being his agents and agents for the estate of Mrs. Patterson. Thereafter other payments were accepted by said trustee, under stipulation that their acceptance should be without prejudice to any rights of the parties.

Finally the company notified the trustees that it was ready to purchase the property on the terms stated in the said leases, but the trustees declined to sell. They had previously offered to lease for six years, at $1,500 a year, which the company declined to accept.

Not being able to agree, the trustees brought suit before a justice of the peace for possession of said lots in March, 1900, and judgment was given for possession, and an appeal was taken by the company, and the case is now pending in this court, being No. 43895, law.

In August, 1900, said trustees filed suit in this court, No. 44106, law, for use and occupation of said lots from August 1, 1897, claiming $6,500, with interest, which suit is still pending.

The company, claiming it has the right of renewal and purchase under the facts, filed its bill to enjoin the prosecution of these two suits at law, and prayed for a decree requiring said trustees to convey said lots for the price and on the terms stated in said lease of August 1, 1872.

An injunction *pendente lite* was granted, and, pending the final hearing, the company has been paying the rental as fixed by the said leases, but without prejudice.

Testimony has been taken, and the cause now is presented for final decree.

It is contended by counsel for the defendants herein that there never was any contract between the trustees and the railroad company which had any binding force, so far as the purchase of this property was concerned, because at most it was only an option and lacked mutuality as a contract, and because it was made with trustees under a will, in a manner not authorized by the will.

It is further contended that even if the formalities prescribed by the will had been observed, that the long delay in accepting
73 the option and the advance in value of the ground would make it inequitable for the court to now decree specific performance.

It seems clear, from a careful reading of the will of Mrs. Pearson, that she did not intend that any of the real estate in which the beneficial interest was devised for life to her daughter, Mrs. Patterson, should be sold except for change of investment, and that such sale could only be made at the request of the life tenant, manifested in a definite manner, as therein provided.

All persons dealing with the property were bound to take notice of the provisions of this will and of the powers of the trustees and the life tenant.

If the trustees and the life tenant had undertaken to sell and convey the property in any other way, such contract, fairly made, could no doubt have transferred said property to a purchaser for the term of the life estate of Mrs. Patterson, but at her death the remaindermen could assert their title.

Neither the life tenant nor the remaindermen are parties to this suit and could not be bound by any decree herein against the trustees. If the trustees, however, have acted within the scope of their powers, they would be bound by such action. Should any question exist as to the action of the trustees being beyond the scope of their powers, then it would seem to be necessary and proper that the persons most interest- in raising that question should be before the court, and they ought to be made parties.

Rule 38 of the equity rules provides that the beneficiaries may be dispensed with in suits concerning real estate which is vested by devise in trustees competent to sell, and to give discharges for proceeds of sale and for rents and profits.

That is hardly this case, for the will seems to provide that the life tenant alone shall have power to give an acquittance to tenants for rent or income, and she alone can authorize the trustees to sell any of the property devised. This rule, then, does not seem sufficient to warrant the court in making a decree affecting the rights of the beneficiaries under this will when they are not made parties.

Waiving that point, however, I am unable to find any substantial ground from the evidence in this case on which a decree for complainant could be based if the proper parties were before the court.

As stated by the Court of Appeals in Jones *v.* Holladay, 2 App. D. C., 289, "He who contracts with a trustee must do so at his risk."

The course of dealing for the many years since the first lease in this case was made has, no doubt, bound all parties to the rental to be paid, at least until such time as objection may have been made to a longer continuance of the arrangement, but I am unable to find that any valid contract was made for a sale either, in the first instance, by any of said contracts of lease or by ratification by the *cestui que trust* thereafter, such as was expressly provided by the will and such as is required to be proven before a court of equity will decree specific performance.

I do not wish to be understood as expressing any opinion as to the effect of continued occupancy after the expiration of any lease,
74 under the facts in this case, with reference to the amount of the rental to be paid. That is a matter which the court can determine on the law side.

Without extending this opinion further, I am convinced that the complainant is not entitled to the relief prayed on the facts shown in this case, and I am therefore constrained to dismiss the bill.

JOB BARNARD, *Justice.*

Final Decree.

Filed Feb. 28, 1901.

In the Supreme Court of the District of Columbia.

BALTIMORE & OHIO RAILROAD COMPANY *vs.* FRANCIS WINSLOW, AUGUSTUS JAY, and The American Security and Trust Company, Substituted Trustees under the Will of Catharine Pearson. } No. 21764. In Equity.

This cause came on to be heard at the January term and was argued by counsel; and thereupon, upon consideration thereof, it is this 27th day of February, A. D. 1901, dered, adjudged, and decreed as follows: That the injunction heretofore ordered in this cause be, and the same hereby is, dissolved, and that the bill of complaint be, and the same hereby is, dismissed, with costs, and that the defendants have execution therefor as at law; and from this decree an appeal is in open court prayed by and allowed to the complainant.

JOB BARNARD, *Justice.*

Memorandum.

March 14, 1901.—Appeal bond filed.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 130, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 21764, equity, wherein The Baltimore and Ohio Railroad Company is complainant and Francis Winslow *et al.* are defendants, as the same remains upon the files and of record in said court.

75

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 18th day of April, A. D. 1901.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1087. The Baltimore and Ohio Railroad Co., appellant, *vs.* Francis Winslow *et al.* Court of Appeals, District of Columbia. Filed Apr. 19, 1901. Robert Willett, clerk.

76 THURSDAY, *May 23d, A. D.* 1901.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant,
vs.
FRANCIS WINSLOW, AUGUSTUS JAY, and THE AMERICAN Security and Trust Company, Substituted Trustees under the Will of Catherine Pearson, Deceased. } No. 1087.

The argument in the above-entitled cause was commenced by Mr. George E. Hamilton, attorney for the appellant.

FRIDAY, *May 24th A. D.* 1901.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant,
vs.
FRANCIS WINSLOW, AUGUSTUS JAY, and THE AMERICAN Secu*rity* and Trust Company, Substituted Trustees under the Will of Catherine Pearson, Deceased. } No. 1087.

The argument in the above-entitled cause was continued by Mr. George E. Hamilton, attorney for the appellant, and by Mr. Wm. G. Johnson, attorney for the appellees, and was concluded by Mr. George E. Hamilton, attorney for the appellant. The respective counsel allowed to file additional briefs herein.

77 *Opinion.*

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant,
vs.
FRANCIS WINSLOW, AUGUSTUS JAY, and THE AMERICAN Security and Trust Company, Trustees. } No. 1087.

(Mr. Justice MORRIS delivered the opinion of the court:)

This is a suit in equity instituted in the supreme court of the District of Columbia by The Baltimore and Ohio Railroad Company, the appellant here, as complainant, against the appellees, as trustees under the will of Catherine Pearson, deceased, to enjoin certain proceedings at law begun by said trustees to recover the possession of lots numbered nine, ten, eleven, and twelve, in square 710, in the city of Washington, held by said railroad company, and over which the tracks of its Metropolitan branch are constructed.

Catherine Pearson, who died prior to August 1, 1872, and who at the time of her death was the owner of the lots of ground mentioned, left a will whereby, after some bequests not here important to be stated, devised all the rest and residue of her estate, which included the lots in question, to trustees therein named upon certain specified trusts. It is this portion of the will which enters into the present controversy; and it reads as follows:

"All the rest and residue of my estate, real and personal, wheresoever situated, I give and devise to Carlisle P. Patterson, William

H. Philip and Walter S. Cox, or the survivors or survivor of them, to be by them held as trustees for the sole and separate use of my dear daughter Eliza Patterson during the term of her natural life, and so that the same shall not be liable for the debts or subject to the control, contracts or engagements of her present or after-taken husband; to permit her by herself, or her special attorney appointed in writing to be signed by her, to receive the annual income
78 and profits of the same for her own sole and separate use, her receipt or that of her attorney so appointed as aforesaid alone to be an acquittance to the person or persons charged with the payment of such income or any part of the same and to the extent only therein expressed to have been paid; and if she pleases to occupy, possess, and use for her own account, accommodation, and convenience and that of her family any part of the property, real and personal, so held for her separate use and benefit, she shall be allowed to do so: and if at any time the said Eliza Patterson shall, in writing to be signed by her in the presence of and to be attested by a subscribing witness, desire the said Carlisle P. Patterson, William H. Philip, and Walter S. Cox, or the survivors and survivor of them, to sell any part of the estate, real and personal, held by them for her separate use, for the purpose of changing the investment thereof, it shall be lawful for the said named trustees, or the survivors and survivor of them, to sell the same for such purpose, and to transfer and convey the absolute estate in fee therein, to the purchaser thereof; and to invest the same in such manner as the said Eliza W. Patterson may require; and such new investment shall be held by the said trustees for the same use, trusts and purposes and with the same powers and authority of sale and reinvestment as is herein declared of and concerning the original trust subject and separate estate.

"And after the death of the said Eliza W. Patterson the said named trustees and their successors shall hold the said trust subject and separate estate, original and subsequently acquired by sale and reinvestment, for the use and benefit of any child or children of the said Eliza W. Patterson, and the issue of any child or children of the said Eliza who may die leaving issue in the lifetime of said Eliza, and such issue shall take the share or portion of the said estate which their parent or parents would have taken had they survived the said Eliza. And if the said Eliza W. Patterson shall die without leaving a child or children, or issue of any child or children, living at the time of her death, the said trustees and
79 their successors shall hold the said trust subject and separate estate for my right heirs. And if it shall happen that either of the said trustees shall die, or become incapable of acting, or shall refuse to act in the execution of said trusts, then and in every such case, the continuing trustees or trustee shall from time to time nominate some other person or persons, to be approved by the said Eliza W. Patterson, to be trustee or trustees in the place and stead of the person or persons so dying or becoming incapable or refusing to act, and shall convey and settle the said trust subject and separate estate in such manner that the same shall be legally vested in

such continuing trustees or trustee, and such person or persons so named and appointed to that office for the same use, trusts and purposes and with the same power and authority of administration, sale and reinvestment, as is hereinbefore declared of and concerning the said trusts subject and estate, and the said new trustee or trustees shall have the same power to act in the premises in conjunction with the continuing trustees or trustee and as survivors of them, as if they had been originally named trustee or trustees in the premises in this my last will and testament."

This will purports to have been executed on December 4, 1862. Of the trustees named in it Carlisle P. Patterson was the husband of the beneficiary Eliza W. Patterson, who yet survives. He has departed this life, as has also his cotrustee William H. Philip; and the third trustee, the Honorable Walter S. Cox, late one of the justices of the supreme court of the District, has resigned and been discharged from the trust. In their places the appellees Francis Winslow, a son-in-law of Mrs. Eliza W. Patterson, Augustus Jay, a grandson of the testatrix Catherine Pearson, and The American Security and Trust Company, a body corporate in this District, have from time to time been appointed; and they now hold the trust estate mentioned under the will of Catherine Pearson.

By an act of Congress of July 25, 1866, (14 Stat. 250), the Baltimore and Ohio Railroad Company had been authorized to extend the Metropolitan branch of its road into the District of
80 Columbia, with the same rights as it held in Maryland, including the right to acquire property by purchase or condemnation for the construction and use of the road; and subsequent statutes empowered it to extend said branch into the city of Washington over a specified route. This route comprised the lots of ground hereinbefore mentioned. While the railroad company was engaged in the construction and completion of this work, instead of acquiring the lots in question by condemnation, it entered into a lease with the trustees under Mrs. Pearson's will, who were then the original trustees named by the testatrix, whereby the trustees leased the lots to the railroad company for a term of five years from and after August 1, 1872, on the payment of the yearly rental of $755.55 in each and every year, with the privilege to the railroad company to purchase the property at any time during the term for the sum of $12,592, and to receive a good and sufficient deed thereof; and with the further privilege that, at or before the expiration of the term, on the request of the railroad company, the trustees would renew the lease, with the same agreements and privileges for another term of five years, or until such time as they would be prepared to convey the premises with perfect title in fee-simple; and also with the further provision that, in the event of the omission of the railroad company to make a request for the renewal of the lease at or before the expiration of the term, the trustees were required to notify the company of such expiration and to request it to exercise its election to renew the lease, and the privilege of renewal should continue for three months after such notice.

There seems to have been no formal renewal of this lease at the

time of its expiration in 1877: at least no renewal is disclosed by the record. But on February 1, 1883, another lease to the railroad company for a term of five years from and after August 1, 1883, was executed by the then existing trustees, Walter S. Cox, Augustus Jay, and Francis Winslow, with whom the beneficiary, Mrs. Eliza W. Patterson, herself also joined in the execution of the instru-
81 ment, wherein there was no reference to any previous lease, but the rent reserved was the same as in the lease of 1872, that is, $755.55 a year, as were also the privileges for purchase at $12,592, and for further renewal.

Again on January 30, 1888, another lease, identical with the last in every respect except the dates, and except also that Mrs. Patterson herself did not execute it as a party, was executed by the same trustees and the railroad company for a term of five years from and after August 1, 1887.

On October 17, 1892, a new lease, identical in terms with the previous one and purporting to be made by the same trustees, for a further terms of five years from and after August 1, 1892, was executed and delivered to the railroad company by Francis Winslow alone, as trustee. It would seem that Mr. Justice Cox had then withdrawn from the trust and no successor to him had been appointed, and that the other trustee Jay was absent in Europe, where he had become domiciled; so that Winslow at this time, although himself often absent from the District of Columbia and from the United States, remained the only active trustee.

No other formal lease seems to have been executed. But on August 4, 1897, three days after the expiration of the last-mentioned, the railroad company notified the trustees of its desire for a renewal for a further term of five years. To this request Mr. Justice Cox replied that he was no longer trustee, and that Jay was absent in Europe; and he referred the company to Winslow as the acting trustee. Winslow, in course of time, answered the request in the following terms in a communication to one of the attorneys for the company:

"My understanding is that originally the R. R. Co., wishing to purchase the property, could not do so on account of some deficiency in the title. The immediate use of the property being necessary, a lease was made, but in such form as would compel the transfer of the lots at the price agreed whenever a clear title could be
82 given. Pending the transfer, the R. R. Co was to pay 6% on the deferred payment. The renewal of the lease has always been made under the same reciprocal conditions and obligations, and I do not feel authorized to change them; but I suggest, as we are now able to furnish a satisfactory title, the present is a suitable time to transfer the property. I enclose a more formal notice in reply to a letter received from the railroad authorities."

The more formal notice referred to was in the following terms:

"In reply to your letter in relation to the renewal of the lease of the lots in square 710 in this city, I beg to say that we are now prepared to convey the property with a perfect title, and prefer executing such conveyance to renewal of the lease."

This was on September 27, 1897. During the whole period from

the beginning of the first lease in 1872 it seems that checks for the rent as it became due were drawn by the railroad company to the order of the trustees and were indorsed by the trustees, or by one of them in the name of all, to Mrs. Eliza W. Patterson, who was entitled to receive the money under Mrs. Pearson's will. Frequently Mrs. Patterson was in communication with the officers of the railroad company with reference to these checks, and how they were to be drawn, and where they were to be sent. These communications continued as late as February 5, 1898, on which day she requested some modification of a check that had been sent to her on account of the absence both of Jay and Winslow, the trustees, from the United States; and she continued to receive the rent, which seems to have been paid semi-annually, up to August 1, 1898.

On August 12, 1898, a check was sent to Winslow, trustee, by the company for $377.77, apparently for the semi-annual rent due and payable on August 1, 1898. This check was received by Winslow, but not cashed; and on inquiry by the company in regard to it in January of 1899, Winslow wrote, under date of January 31, 1899, the following letter to the company's treasurer:

83 "I am in receipt of your letter of January 20th in relation to the voucher for rent for the premises in Washington. The voucher was received, but pending advice of counsel no action was taken in regard to it. I am advised that the company are and for some time have been only tenants at sufferance; and I have notified Mr. McCubbin (land agent of the company) of that fact, and invited a proposition from the company. Pending a more definite arrangement than now exists, I do not feel justified in accepting payments without the company's full understanding of my position, and have therefore suspended action on the voucher."

Further correspondence ensued between Winslow and the land agent of the company, of which the result was that the company first requested a new lease and finally tendered itself ready and willing to pay the purchase-money—the sum of $12,592—specified in the agreements heretofore mentioned upon the execution and delivery to it of a proper deed, and that Winslow declined both propositions, with this statement: "We prefer to sell the property rather than lease it, but neither in case of sale or lease could we be governed by conditions or prices existing some twenty-five years ago." It appeared that the property had become appreciated in value, the testimony in the record being that it is now worth upwards of thirty thousand dollars.

There were further negotiations continued until about the end of February, 1900, without definite result or special bearing upon the controversy as it now stands before us, and they need not, therefore, be here stated.

Finally the controversy culminated in legal proceedings. On March 8, 1900, in pursuance of a previous notice to quit, the appellees here, as the existing trustees, instituted proceedings before a justice of the peace to dispossess the company and to recover possession of the property. The company, not desiring to have two trials, permitted judgment to be entered by the justice by default

and forthwith appealed from such judgment to the supreme
84 court of the District of Columbia, wherein the cause is yet pending. Subsequently, and while the said proceeding was so pending, the company instituted the present suit by filing its bill in equity to restrain the said proceeding at law, and also another suit which had been instituted to recover for use and occupation; and also to have a conveyance of the property at the price and according to the terms of the lease of August 1, 1872, and the several subsequent renewals thereof; and, if necessary, for a further renewal lease for five years from August 1, 1897; and also for general relief.

There was a temporary restraining order issued, which was afterwards continued to the final hearing. Thereupon answer was filed, and testimony was taken. At the final hearing, the court below dissolved the injunction and dismissed the bill of complaint: and from the decree the present appeal has been prosecuted.

The question principally argued before us in the case is, whether, in the execution of the lease of August 1, 1872, and of its subsequent renewals, the trustees of the estate of Catherine Pearson acted within the scope of their authority as such trustees, when they inserted, or caused to be inserted, therein the provision that the railroad company should have the right thereafter to purchase the property in fee-simple, with a good and valid title, at a certain specified sum of money; and this question we deem it unnecessary to determine. We may say, however, that such an arrangement entered into with a railroad company, armed with the power of the State to prosecute a great public enterprise, and empowered for that purpose to take property by the exercise of the right of eminent domain, may stand upon a somewhat different basis from a similar arrangement entered into with an ordinary purchaser. But however this may be, and we find it necessary to make no decision in regard to it, the power of the trustees, with the assent and concurrence of the beneficiary, to execute the leases which have been recited, except as to the provision for sale, is not open to reasonable
85 doubt. The contention in this regard is that the leases in question were not properly and sufficiently executed by the parties in interest; that only in two cases has the railroad company joined in such execution, the leases of 1872 and 1888; that only in one instance, the lease of 1883, has the beneficiary, the life tenant of the property, joined; that the lease of 1892 was executed only by one of the three trustees, and is wholly invalid; and that all these leases are now at an end and wholly inoperative for any purpose.

We find no merit in this contention. There is no ground whatever in law for the assumption that the signature or formal execution of the railroad company was necessary to the validity of any of the leases; and as to the other objections it is sufficient to say that the life tenant of the property and the beneficiary of the trust during her life, who was and is the sole substantial party in interest, ratified and sanctioned all the leases in question, and has received for upwards of twenty-five years all the rent specified in them to be

paid by the lessee. Neither she nor her trustees can now be permitted to repudiate them. Least of all, will a court of equity allow such repudiation. In equity at least, if not at law, the leases were her leases rather than those of her trustees; and we are not sure that she was not entitled to deal with the property without the intervention of any trustees, and to rent and lease the same at her pleasure, so as to render it productive of income. She was the life tenant, entitled to the use and occupation of the property in her own right, and to receive the income therefrom directly for her own use and upon her own acquittance or receipt, without the intervention of trustees, and for most of the time she was absolutely *sui juris*, a *feme sole*, and competent to deal with her own affairs as she thought proper. It is difficult, therefore, to see why she was not empowered, at all events in equity, to rent and lease this property at her own pleasure. The function of the trustees under the will of Catherine Pearson would seem to have been to secure her life estate and her use and enjoyment of the property from marital control and
86 marital liability rather than to interfere with her management of the estate. In their assumption of such management they acted rather as her agents than as trustees having independent control of the property.

It is of no consequence, therefore, that Mr. Winslow alone executed the last formal lease that was given, that of 1892. He was then to all intents and purposes the sole trustee acting in the execution of the trust. Mr. Justice Cox had been relieved and discharged from the trust by decree of court of June 13, 1892; and Mr. Jay would seem to have become a non-resident of the District of Columbia and of the United States, and to have abandoned all active part in the administration of the trust, if indeed it required action on his part. Under these circumstances, Winslow's lease of the property ratified by the life tenant and for the time being the sole beneficiary, who received and who has continued to receive to this day the consideration for it, which was the income contemplated by the will of Catherine Pearson, cannot now be questioned. Certainly it cannot be questioned in a court of equity, after the term created by the lease has expired and the beneficiary has derived from it all the consideration required in it to be rendered by the appellant.

Omitting from our consideration the clause of the lease of 1892 which provides for the privilege of purchase by the lessee of the property, which provision may for all present purposes be segregated from the instrument, we find no reason for holding that this lease is not a valid lease binding on the trustees of the estate and binding on the beneficiary and life tenant. The covenant for renewal therein contained is not an unreasonable or improper covenant; and we understand it to be conceded on behalf of the appellees that it is a valid and binding covenant, and that the appellant is entitled to one renewal of the lease, if the lease itself is valid and binding. This concession, which is a just and proper one, dispenses with the necessity of any discussion of this point; and being of the opinion, as we have already stated, that the lease is a good *a* valid lease,

it follows in our judgment that the appellant is entitled to the
87 renewal of it from the first day of August, 1897, for the term of five years thereafter which it seeks under the bill of complaint in this case. Being so entitled, it is not liable to proceedings for dispossession or any other similar proceedings; and the proceedings instituted against it and which it is sought by this suit to restrain should be perpetually enjoined.

But there is another and higher ground upon which our conclusion in this case can be based.

That the appellant entered upon the use and occupation of the property in controversy with a view to its purchase when such purchase could properly be effected, we think is very clear. And that this purchase was postponed for a time merely on account of some alleged or supposed deficiencies in the title, which could be removed, and which, if Mr. Winslow's statement in 1899 be correct, were in fact removed at or before that year, we think to be a fair inference from the record. What the character of the use and occupation of the land by the company was to be, and was understood by all the parties to be intended to be, we think also to be entirely clear. Over and through this land the railroad company constructed what is known as its Metropolitan branch, part of a great highway between Washington city, the adjoining States, and the great West. This great highway is not a merely private enterprise, nor a matter of purely private concern: it is a public road, constructed for public purposes, under sanction of the public authority, and over which the public have rights, which cannot be permitted to be obstructed, much less destroyed, either by the company itself to which the franchise has been granted as a public trust to construct and operate this road, or by antagonistic parties claiming the ownership of the land upon which it has been permitted to enter without previous payment therefor, or as the result of any private controversy between the railroad company and such parties. It is very clear that the appellees knew the purpose for which the land was needed, and for which it was subsequently and is now used; and that, with full
88 knowledge of such purpose and intending that such purpose should be carried into effect, they authorized the railroad company to enter upon the land and to construct the road thereon. The best evidence of the license so given to enter is to be found in the lease given at the time and the successive leases executed thereafter; and it is beyond question that such license was given to the company. This license was not solely for the benefit of the railroad company, but primarily for the benefit of the public, which required this construction for its use. The license was in effect a dedication of the land for a highway, subject, of course, to the right of compensation therefor, which can be enforced in a proper way, but not by the dispossession of the company or the destruction of the public easement. The license to enter and construct the road is in its nature irrevocable. It cannot be recalled, except as the result of the destruction of the railroad company and the abandonment of

the franchise. It is well-settled law that an action at law for the dispossession of the railroad company cannot be maintained in such a case, if the company is willing to make compensation for the use and occupation of the land. Railroad Co. *vs.* Stanley, 35 N. J. Eq. 283; Railroad Co. *vs.* Bruce, 102 Pa. State, 23; Railroad Co. *vs.* Taylor, 63 Wisconsin, 325; Prevolt *vs.* Railroad Co. 57 Mo. 256; Railroad Co. *vs.* Turner, 31 Ark. 494.

Assuming that there is grave doubt whether the trustees under the will of Catherine Pearson had authority under that will to enter into the contract of sale to the railroad company, which they incorporated into their several leases, we do not think that the contract is one of which specific performance should be decreed in equity under the circumstances of this case. Even when a contract is free from doubt, it is well-settled law that specific performance will not always be decreed. Specific performance generally rests in the sound judicial discretion of the court of equity. In the present case the railroad company has another remedy, plain and adequate, whereby to preserve its own rights and those of the public in the
89 premises, that of the exercise of the right of eminent domain vested in it by its charter and by the act of Congress which authorized its entrance into this city and District; and it is both its right and its duty to exercise that right by taking steps in the present suit or otherwise, as it may be advised, to ascertain the value of the use and occupation which it desires of the land in question and to make compensation therefor to the owners of the land. Railroad Co. *vs.* Stanley, 35 N. J. Eq. 283; Drury *vs.* Midland Railroad Co. 127 Mass. 571; Railroad Co. *vs.* Bruce, 102 Pa. State, 23; Railroad Co. *vs.* Johnston, 59 Pa. State, 290; Railroad Co. *vs.* Taylor, 63 Wisc. 325; Prevolt *vs.* Railroad Co. 57 Mo. 256; Railroad Co. *vs.* Turner, 31 Ark. 494; Gilman *vs.* Railroad Co., 37 Wisc. 317; Railroad Co. *vs.* Lewton, 20 Ohio St. 401; Trenton Water Co. *vs.* Chambers, 1 Stockt. 471; Railroad Co *vs.* Booraem, 1 Stew. Eq. 450.

The case of Railroad Co. *vs.* Stanley, above cited, is directly in point. There the owners of land, on which a railroad company proposed to construct its railroad, entered into an agreement with the company for the use and occupation of the land by the latter, in consideration of the establishment of a depot or station thereon by the company, and certain arrangements for the running of trains. The company took possession of the land and constructed its railroad, but failed to build the station. It became insolvent, and its property and franchises were sold under foreclosure, and another company, organized under the general law of the State, became the owner and possessor of them. Ejectment was instituted by the owners of the land against the latter company to recover possession of the property; and the company thereupon filed a bill in equity to stay the proceedings. The court of errors and appeals of the State of New Jersey held that the complainant company was entitled to the injunction which it prayed.

The other cases cited are substantially to the same effect; and the principle established by them adverse to the right of the owners

of the land to repossession seems to be fair and just, and to afford a proper criterion for the determination of the case now before us.

90 In view of what has been said, we are of opinion that, under the provisions of the lease of 1892, executed by Francis Winslow, trustee, for and on behalf of the life tenant, Mrs. Eliza W. Patterson, the appellant was and is entitled to one renewal of such lease for the term of five years from and after the first day of August, 1897, upon the terms and conditions of said lease as to the rents to be paid therefor, and that during the continuance of such term no suit for the dispossession of the appellant can be maintained. We are also of opinion that, for the time subsequent to the determination of said renewed lease for which the appellant shall require the use and occupation of said land, the appellant is entitled and it is its duty to acquire the right to such use and occupation, under the exercise of the right of eminent domain conferred upon it by the act of Congress, by the ascertainment of the value of such use and occupation, and payment to the owners of the land of the just compensation so to be ascertained, and the bill of complaint in this cause may be retained for the purpose of such ascertainment of value and just compensation.

It follows that the decree of the supreme court of the District of Columbia, dissolving the injunction granted in this cause and dismissing the bill of complaint, must be reversed, with costs, and that the cause will be remanded to that court, with directions to vacate said decree, to restore the injunction and make the same perpetual, and for such further and other proceedings as may be just and proper, according to law and in conformity with this opinion, and it is so ordered.

91 TUESDAY, *June 18th, A. D.* 1901.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant, *vs.* FRANCIS WINSLOW, AUGUSTUS JAY, and The American Security and Trust Company, Substituted Trustees under the Will of Catherine Pearson, Deceased.	No. 1087, April Term, 1901.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court, in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said supreme court, with directions to vacate said decree, to restore the injunction

and make the same perpetual, and for such further and other proceedings as may be just and proper, according to law and in conformity with the opinion of this court.

Per MR. JUSTICE MORRIS.

June 18, 1901.

92 TUESDAY, *June 18th, A. D.* 1901.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant,
vs.
FRANCIS WINSLOW, AUGUSTUS JAY, and THE AMERICAN Security and Trust Company, Substituted Trustees under the Will of Catherine Pearson, Deceased. } No. 1087.

On motion of Mr. William G. Johnson, of counsel for the appellees in the above-entitled cause, it is ordered by the court that said appellees be allowed an appeal to the Supreme Court of the United States, and the bond to act as a supersedeas is fixed at the sum of one thousand dollars.

93 Know all men by these presents, that we, Francis Winslow, Augustus Jay and The American Security and Trust Company, substituted trustees under the will of Catherine Pearson, deceased, as principals, and Charles J. Bell as surety, are held and firmly bound unto The Baltimore and Ohio Railroad Company in the full and just sum of one thousand dollars, to be paid to the said The Baltimore and Ohio Railroad Company, its certain attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-second day of June in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between The Baltimore and Ohio Railroad Company, as appellant, and the said Francis Winslow, Augustus Jay and The American Security and Trust Company, substituted trustees under the will of Catherine Pearson, deceased, as appellees, a decree was rendered against the said appellees, from which an appeal to the Supreme Court of the United States was prayed by and allowed to the said appellees, to reverse the decree in the aforesaid suit, and a citation directed to the said The Baltimore and Ohio Railroad Company has been issued, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington within thirty days from the date thereof,

Now, the condition of the above obligation is such, that, if the said Francis Winslow, Augustus Jay and The American Security and Trust Company, substituted trustees under the will of Catherine Pearson, deceased, shall prosecute their said appeal to effect, and

answer all damages and costs if they fail to make their plea
94 good, then the above obligation to be void; else to remain in full force and virtue.

FRANCIS WINSLOW, *Trustee*, [SEAL.]
By WM. G. JOHNSON, *Attorney-in-fact.*
AUGUSTUS JAY, *Trustee*, [SEAL.]
By WM. G. JOHNSON, *Attorney-in-fact.*
AMERICAN SECURITY AND TRUST CO., *Trustee*, [SEAL.]
By C. J. BELL, *President.*

Attest: JAMES F. HOOD, *Secretary.*

CHARLES J. BELL. [SEAL.]

Sealed and delivered in the presence of:
WM. A. McKENNEY.

Approved by:
R. H. ALVEY,
Chief Justice, Court of Appeals,
District of Columbia.

[Endorsed:] No. 1087. The Baltimore & Ohio Railroad Co. *vs.* Francis Winslow *et al.* Supersedeas bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed June 24, 1901. Robert Willett, clerk.

95 UNITED STATES OF AMERICA, *ss:*

To the Baltimore and Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Francis Winslow, Augustus Jay, and The American Security and Trust Company, substituted trustees under the will of Catherine Pearson, deceased, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 24th day of June, in the year of our Lord one thousand nine hundred and one.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the
District of Columbia.

Service of the above citation accepted this 24th day of June, A. D. 1901.

HAMILTON & COLBERT,
Attorneys for Baltimore & Ohio
Railroad Company, Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun. 24 1901 Robert Willett, clerk.

96 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 95 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Baltimore and Ohio Railroad Company, appellant, *vs.* Francis Winslow, Augustus Jay, and The American Security and Trust Company, substituted trustees under the will of Catherine Pearson, deceased, No. 1087, April term, 1901, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 28th day of June, A. D. 1901.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,212. District of Columbia Court of Appeals. Term No. 359. Francis Winslow, Augustus Jay, and The American Security & Trust Company, substituted trustees under the will of Catherine Pearson, deceased, appellants, *vs.* The Baltimore & Ohio Railroad Company. Filed June 29th, 1901.

No. 359. 1901
Motion to advance

Office Supreme Court U. S.
FILED
OCT 19 1901
JAMES H. McKENNEY,
Clerk.

Filed Oct. 19, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 359.

FRANCIS WINSLOW ET AL., TRUSTEES,
APPELLANTS,

vs.

THE BALTIMORE AND OHIO RAILROAD,
APPELLEE.

MOTION TO ADVANCE.

WM. G. JOHNSON,
Counsel for Appellants.

LAW REPORTER PRINT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 359.

FRANCIS WINSLOW ET AL., TRUSTEES,
APPELLANTS,

vs.

THE BALTIMORE AND OHIO RAILROAD,
APPELLEE.

Come now the appellants, Francis Winslow, Augustus Jay and The American Security and Trust Company, substituted trustees under the will of Catherine Pearson, deceased, by their counsel, William G. Johnson, and move this Honorable Court, to advance this cause for argument to a day during the present term of the court sufficiently early to admit of its disposition by the court before the adjournment of this term, for the reasons set forth below.

WILLIAM G. JOHNSON,
Counsel for Appellants.

The ground upon which the advancement of this case is sought is that the decree appealed from is one of peculiar and unusual hardship, irremediable by reversal unless speedily had.

STATEMENT OF MATTER INVOLVED WITH REASONS FOR APPLICATION.

This is an appeal from a decree of the Court of Appeals of the District of Columbia (Rec., pp. 83, 84), perpetually enjoining the appellants from prosecuting proceedings at law for possession of the property in controversy and from prosecuting other proceedings at law for the recovery of money damages for the alleged wrongful use and occupation of said property.

This is a proceeding in equity brought by the appellee, the Baltimore and Ohio Railroad Company, against the appellants, Francis Winslow, Augustus Jay, and The American Security and Trust Company, in their character as substituted trustees under the will of Catherine Pearson, deceased.

The primary object of the bill is to compel specific performance, by the trustees under the will, of an alleged contract for the sale and conveyance, to the appellee, of a part of the trust estate (lots 9, 10, 11 and 12 in square 710), as appears by the averments of the bill, particularly the third paragraph (Rec., p. 2), and by the second prayer for relief (Rec., p. 6). Incidentally and as appropriate to the main relief sought, the bill seeks to enjoin the appellants from prosecuting a proceeding at law for possession of the property in controversy and also another proceeding at law for compensation for its use (Prayers 3 and 4; Rec., pp. 6–7).

By the will of Catherine Pearson (Rec., pp. 26–29), after several pecuniary bequests not material to be noticed, the testatrix devised all the residue of her estate, both real and personal, to Carlile P. Patterson, William H. Philip and Walter S. Cox, to be held by them for the sole and separate use of the daughter of the testatrix, Eliza W. Patterson, during her life, with certain active trusts to be performed by the trustees, and, after the death of said Eliza W. Patterson, in trust to hold the same for the use and benefit of

the children of said Eliza W. Patterson, or the issue of any children who may have died in the lifetime of the said Eliza. In the event of the death of Eliza W. Patterson, leaving no issue or descendants of any issue, the trustees were then to hold in trust for the right heirs of the testatrix. Provision is also made for the substitution of other persons for the trustees named in the will, in the event of their death, disability, or refusal to act, so that the number of trustees might be kept up to three during the continuance of the trust.

Neither Mrs. Patterson nor any one of her children, the beneficiaries under the will, all of whom are alive, is made a party to the proceedings or has been heard therein.

The pertinent provisions of the will are as follows:

The property is devised to the trustees—

> "to be by them held as trustees for the sole and separate use of my dear daughter Eliza Patterson during the term of her natural life" (Rec., p. 27).

The trustees are—

> "to permit her by herself, or her special attorney appointed in writing to be signed by her to receive the annual income & profits of the same for her own sole and separate use . . . and if she please to occupy possess and use for her own account accommodation & convenience & that of her family any part of the property real and personal so held for her separate use & benefit she shall be allowed to do so" (Rec., p. 27).
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> . . . . . .
>
> "and if at any time the said Eliza Patterson shall in writing to be signed by her in the presence of & to be attested by a subscribing witness desire the said Carlile P. Patterson, William H. Philip and Walter S. Cox or the survivors & survivor of them to sell any part of the estate real & personal held by them for her separate use, for the purpose of changing the investment thereof, it shall be lawful for the said named trustees or the survivors or survivor of them to sell the same for such purpose only" (Rec., p. 27).

On the 1st of August, 1872, the original trustees named in the will and the Baltimore and Ohio Railroad Company entered into a lease for the premises in controversy (Rec., pp. 7 and 8). The term demised by said lease was "the full term of five years from the first day of August instant" (Rec., p. 7). The lease also contained a privilege to the railroad company to purchase said land—

> "at any time during the term aforesaid, on payment to them by said party of the second part of the sum twelve thousand five hundred and ninety-two dollars" (Rec., pp. 7 and 8).

The said lease also contained an agreement to renew in the words following:

> "That at or before the expiration of the term aforesaid, on the request of said party of the second part, its successors and assigns, they will renew this lease, with the same agreements and privileges as are herein contained for another term of five years or until such time as the said parties of the first part shall be prepared to convey the said premises as hereinbefore agreed, with a perfect title in fee-simple thereto" (Rec., p. 8).

The said lease was not signed by Eliza W. Patterson.

Subsequently and on the 1st of February, 1883, another lease in the same terms was executed by the then trustees, Walter S. Cox, Augustus Jay and Francis Winslow, and signed by Eliza W. Patterson; but her signature was not attested by any subscribing witness, nor was the lease executed by the railroad company (Rec., pp. 8 and 9).

On the 30th of January, 1888, the said trustees, Cox, Winslow and Jay, and the appellant, by its president, executed another lease of the said premises for the period of five years from the 1st of August, 1887, containing the same conditions and covenants expressed in the first and second leases, heretofore referred to. This lease was not signed by Mrs. Patterson (Rec., pp. 24 and 25).

On the 13th of June, 1892, by regular proceedings in the Supreme Court of the District of Columbia, Walter S. Cox was, by decree of that court, relieved from the office of trustee (Rec., p. 30), but no one was substituted in his stead.

On the 17th of October, 1892, the trustee, Winslow, signed a lease drawn in the names of Cox, Winslow and Jay, as trustees, containing the same provisions and covenants as those hereinbefore mentioned, for the term of five years from the 1st day of August, 1892 (Rec., pp. 9 and 10). This lease was not signed nor in any way concurred in by the other trustee, Jay, nor by Mrs. Patterson, nor was it executed by the railroad company. This latter lease is the last agreement signed by any of the parties relating to the possession or sale of the said property.

The property in controversy contains 41,975 square feet (Rec., p. 52). The purchase price fixed in the lease of 1872 and continued in the several subsequent leases is $12,592 or thirty cents per foot. The complainant's own evidence, the only testimony in the cause, shows the value of the property to be from sixty-five to seventy-five cents per square foot (Rec., p. 45), or from $27,287.75 to $31,481.25 for the whole.

Thus, the complainant asks a court of equity to compel the trustees to convey to it the estate of their *cestui que trust* at from $14,691.75 to $18,889.25 less than its value.

The same gross inequity applies to the rental fixed in the lease.

By the testimony of complainant's witness, the fair rental value is 5 per centum on the value of the property (Rec., p. 48), which would be, according to complainants' own proof, from $1,364.18 to $1,574.06 per annum, or from $608.63 to $818.51 per annum more than the rental in the lease.

In addition to this gross inequity in the alleged contract there is an utter lack of mutuality. At no time from 1872

to the filing of this bill could the complainant have been compelled either to renew the lease or purchase the property at the sum stipulated or at any sum.

The provisions for sale and renewal are wholly at the option of the railroad company, and this optional character is shown and distinctly availed of by the declination of the company to purchase contained in the letter of its agent of February [error for January] 28, 1899, in which he says (Rec., p. 56):

> "Our counsel advises me that *we have the right to tender the money and demand a deed*, but as I *do not have an appropriation for this particular purchase we prefer to arrange a lease.*"

And again, in the letter of February 18, 1899, he says (Rec., p. 12):

> "The present status of the company *makes it a little troublesome to purchase property at this time*, and therefore we would prefer a proposition to lease."

To the first letter above quoted from, after suggesting the lease instead of purchase, is added this statement (Rec., p. 56):

> "This will tide us over until *after the reorganization*, when we *will be in better shape to arrange for the purchase* of the lot, *if it is found to be necessary for our purposes.*"

The Supreme Court of the District granted a preliminary injunction (Rec., pp. 13–14), which was continued until the final hearing (Rec., p. 32); when it was dissolved and the bill dismissed (Rec., p. 73), the court being—

> "unable to find any substantial ground from the evidence in this case on which a decree for complainant could be based" (Rec., p. 72).

By the opinion of the Court of Appeals, reversing the decree of the Supreme Court (Rec., pp. 74–83), the appellee

is held to be entitled to a renewal of the lease of 1892 (Rec., pp. 9–10), drawn in the names of all the trustees, but signed by Winslow alone, and to possession thereunder until August 1, 1902, and thereafter to continue in possession for such indefinite and indeterminate period as the appellee "shall require the use and occupation of said land" (Rec., p. 83), thus placing the continued possession of the property entirely at the option of the railroad, which may continue or terminate the possession at its pleasure—a lease at the will of the lessee alone—the compensation therefor being left to subsequent proceedings to be begun by the Railroad Company, the appellants being in the interim enjoined from proceeding, by ordinary legal process, either to recover possession or compensation for the use and occupation.

No bond to protect appellants from damage resulting from the wrongful suing out of the injunction was given, the forty-second equity rule of the Supreme Court of the District excepting from such requirement cases restraining proceedings at law.

Thus it is seen that the appellants are wholly without protection from loss or injury pending these proceedings, and that unless an early decision shall be rendered on this appeal a reversal of the decree may fail of remedial results.

If the cause be not advanced for hearing at this term, the appellee will be enabled to enjoy possession of the property up to August, 1902, before any judgment of reversal can be rendered, and as to that part of the decree below a judgment of reversal by this court would be barren of results.

As the continuing possession accorded the appellee after August 1, 1902, is indefinite and to extend only during the pleasure of the appellee, the appellee may satisfy its pleasure in that regard before disposition of this case by this court or before the proceedings for possession, now enjoined, can be prosecuted to effect, thus leaving all the advantage

of the right of the parties to possession dependent upon one of them.

It is respectfully submitted that the peculiar hardship to the beneficiaries of this estate, resulting from the anomalous position in which the court below has placed them, warrants the trustees in seeking and justifies this court in granting an early hearing of this appeal.

WM. G. JOHNSON,
Counsel for Appellants.

Please take notice that the foregoing application will be submitted to the court on Monday, October 14, 1901, at noon, or so soon thereafter as counsel can be heard.

WM. G. JOHNSON,
Counsel for Appellants.

Service of copy of above application and notice acknowledged this fifth day of October, 1901.

GEORGE E. HAMILTON,
Counsel for Appellee.

FILE COPY.

Office Supreme Court U. S.
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DEC 16 1902
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 125.

FRANCIS WINSLOW, AUGUSTUS JAY AND THE AMERICAN SECURITY AND TRUST COMPANY, SURSTITUTED TRUSTEES UNDER THE WILL OF CATHERINE PEARSON, DECEASED, APPELLANTS,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, APPELLEE.

BRIEF FOR APPELLANTS.

WM. G. JOHNSON,
Counsel for Appellants.

LAW REPORTER PRINT, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 125.

FRANCIS WINSLOW, AUGUSTUS JAY AND THE AMERICAN SECURITY AND TRUST COMPANY, SUBSTITUTED TRUSTEES UNDER THE WILL OF CATHERINE PEARSON, DECEASED, APPELLANTS,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, APPELLEE.

BRIEF FOR APPELLANTS.

STATEMENT.

This is a proceeding in equity brought by the Baltimore and Ohio Railroad Company, against the appellants, Francis Winslow, Augustus Jay, and the American Security and Trust Company, in their character as substituted trustees under the will of Catherine Pearson, deceased.

The object of the bill is to compel specific performance of an alleged contract for the sale and conveyance, by the trustees under the will, to the appellee, of a part of the trust estate (lots 9, 10, 11 and 12 in square 710, in the city of Washington, District of Columbia), as appears by the averments of the bill, particularly the third paragraph (Rec., p. 2), and by the second prayer for relief (Rec., p. 6). Incident-

ally and as appropriate to the main relief sought, the bill seeks to enjoin the appellees from prosecuting a proceeding at law for possession of the property in controversy and also another proceeding at law for $6,500 claimed as compensation for its use (Prayers 3 and 4; Rec., pp. 6–7).

Upon the filing of the bill a preliminary restraining order was issued (Rec., pp. 13, 14), which was continued until the final hearing (Rec., p. 32).

The cause came on for final hearing upon the pleadings and evidence before Mr. Justice Barnard, who, on the 27th of February, 1901, entered a decree, dissolving the injunction and dismissing the bill (Rec., p. 73), for the reasons set forth in his opinion filed in the cause (Rec., pp. 70–73).

From this decree the Railroad Company appealed to the Court of Appeals (Rec., p. 73).

The Court of Appeals, by its decree (Rec., pp. 83–84) and opinion (Rec., pp. 74–83), reversed the decree of the Supreme Court of the District, restored the injunction, and made the same perpetual; adjudged the Railroad Company to be entitled to a lease of the premises for five years from August 1, 1897, at the rate of $755.55 per annum, and to have the right through the exercise of power of eminent domain to acquire the use and occupation of the premises for such further and subsequent time as it should require (Rec., p. 83).

From this decree the appellants appealed to this court (Rec., p. 84).

The case arose out of the following state of facts:

Catherine Pearson, by her last will and testament dated December 4, 1862, and probated June 30, 1868 (Rec. pp. 26, 29) after making several pecuniary bequests not material to be noticed devised all the rest and residue of her estate to Carlile P. Patterson, William H. Philip and Walter S. Cox in the terms following (Rec. pp. 27–28):

> "Seventhly. All the rest and residue of my estate real and personal wheresoever situated I give and de-

vise to Carlile P. Patterson, William H. Philip & Walter S. Cox or the survivors & survivor of them to be by them held as trustees for the sole and separate use of my dear daughter Eliza Patterson during the term of her natural life & so that the same shall not be liable for the debts or subject to the control contracts or engagements of her present or any after taken husband; to permit her by herself, or her special attorney appointed in writing to be signed by her to receive the annual income & profits of the same for her own sole and separate use, her receipt or that of her attorney so appointed as aforesaid alone to be an acquittance to the person or persons charged with the payment of such income or any part of the same & to the extent only therein expressed to have been paid :—and if she please to occupy possess and use for her own account accommodation & convenience & that of her family any part of the property real and personal so held for her separate use & benefit she shall be allowed to do so: and if at any time the said Eliza Patterson shall in writing to be signed by her in the presence of & to be attested by a subscribing witness desire the said Carlile P. Patterson, William H. Philip and Walter S. Cox or the survivors & survivor of them to sell any part of the estate real & personal held by them for her separte use, for the purpose of changing the investment thereof, it shall be lawful for the said named trustees or the survivors or survivor of them to sell the same for such purpose only & to transfer and convey the absolute estate in fee therein, to the purchaser thereof; to receive the proceeds of any & every such sale of the purchaser who shall not be required to see to the application thereof; and to invest the same in such manner as the said Eliza W. Patterson may require; and such new investment shall be held by the said trustees for the same use trusts & purposes & with the same powers & authority of sale and reinvestment as is herein declared of & concerning the original trust subject & separate estate.

"And after the death of the said Eliza W. Patterson the said named trustees & their successors

shall hold the said trust subject & separate estate—original and subsequently acquired by sale and reinvestment—for the use & benefit of any child, or children, of the said Eliza W. Patterson & the issue of any child or children of the said Eliza who may die leaving issue in the lifetime of the said Eliza, & such issue shall take the share or portion of the said estate which their parent or parents would have taken had they survived the said Eliza. And if the said Eliza W. Patterson shall die without leaving a child or children or issue of any child or children living at the time of her death, the said trustees & their successors shall hold the said trust subject & separate estate for my right heirs. And if it shall happen that either of the said trustees shall die, or become incapable of acting, or shall refuse to act in the execution of said trusts, then & in every such case, the continuing trustees or trustee shall from time to time nominate some other person or persons to be approved by the said Eliza W. Patterson to be trustee or trustees in the place & stead of the person or persons so dying, or becoming incapable or refusing to act and shall convey & settle the said trust subject & separate estate in such manner, that the same shall be legally vested in such continuing trustees or trustee and such person or persons so named and appointed to that office for the same uses, trusts & purposes & with the same power & authority of administration sale & reinvestment as is hereinbefore declared of & concerning the said trusts subject & estate, and the said new trustee or trustees shall have the same power to act in the premises in conjunction with the continuing trustee or trustees and as survivors of them, as if they had been originally named trustee or trustees in the premises in this my last will and testament."

On the 1st of August, 1872, Patterson, Philip and Cox, the devisees, trustees in the will, and the Baltimore and Ohio Railroad Company entered into a lease for the premises in controversy (Rec., pp. 7 and 8). The term demised by said

lease was "the full term of five years from the first day of August instant" (Rec., p. 7). The lease also contained a privilege to the railroad company to purchase said land—

> "at any time during the term aforesaid, on payment to them by said party of the second part of the sum of twelve thousand five hundred and ninety-two dollars" (Rec., pp. 7–8).

The said lease also contained an agreement to renew in the words following:

> "That at or before the expiration of the term aforesaid, on the request of said party of the second part, its successors and assigns, they will renew this lease, with the same agreements and privileges as are herein contained for another term of five years or until such time as the said parties of the first part shall be prepared to convey the said premises as hereinbefore agreed, with a perfect title in fee-simple thereto" (Rec., p. 8).

The lease was not signed by Eliza W. Patterson.

Whether any renewal of this lease was executed does not appear in the record. Subsequently Augustus Jay and Francis Winslow became substituted trustees in the place and stead of Patterson and Philip, and on the 1st of February, 1883, another lease in the same terms as the lease of 1872 was executed by the then trustees, Walter S. Cox, Augustus Jay and Francis Winslow, and signed by Eliza W. Patterson; but her signature was not attested by any subscribing witness, nor was the lease executed by the railroad company (Rec., pp. 8 and 9).

On the 30th of January, 1888, the said trustees, Cox, Winslow and Jay, and the appellee, by its president, executed another lease of the said premises for the period of five years from the 1st of August, 1887, containing the same conditions and covenants expressed in the first and second leases, heretofore referred to. This lease was not signed by Mrs. Patterson (Rec., pp. 24 and 25).

Judge Cox retired from the office of trustee in June, 1892,

by virtue of a decree of the Supreme Court of the District relieving him from the office (Rec., p. 30), and the term demised by the lease last above described expired by its own limitations on July 31, 1892.

On October 8, 1892, the firm of Thomas J. Fisher & Co., who were agents for some property belonging to the Patterson estate (Rec., pp. 17, 44), *but not agents for this property* (Rec., pp. 17, 23, 44), wrote to Winslow, at Newberne, North Carolina, inclosing "duplicate leases with the B. & O. R. R. Co. for lots in square 710," requesting that they be executed and returned to them, and they would forward them to the company (Rec., p. 66).

These leases were prepared by the complainant or its officer (Rec., p. 23) On October 12, 1892, the same firm wrote to Winslow, at Jamestown, Rhode Island, inclosing a written offer of one J. Miller of "$50 per month for the part of square 710 leased by the B. & O. R.R. Co." And also advised him of the transmission to him at Newberne, North Carolina, of the leases sent on the 8th of October (Rec., p. 66). Winslow, believing that the leases then tendered were "in accordance with the requirements of the lease of January 30th, 1888," "signed the same under that impression" (Rec., p. 23), and sent them to Fisher & Co., in a note saying (Rec., p. 67):

> "I enclose B. & O. leases. Will you please compare with the original lease and see that they correspond before delivering. I have not a copy at hand, but I suppose Mr. Hamilton has, and if not I think the lease has been recorded."

Whether Fisher & Co. took any steps to see that the lease was proper "before delivering" does not appear.

On the 17th of October, 1892, they wrote Winslow acknowledging receipt of the leases and on the same day wrote to the agent of the railroad company transmitting the leases (Rec., p. 67). It would seem that the railroad company took

exception to the lease being signed by Winslow alone, because on October 18, Fisher & Co. telegraphed the agent of the B. & O. saying (p. 67):

> "Only Winslow & Jay represent Patterson estate. Cox resigned—no successor appointed—leaving other two to act; Jay's address, Sec'y American legation, Paris, France."

These duplicate leases of October 17, 1892, signed by Winslow in the manner and under the circumstances above stated, were never executed by Jay, the other trustee, or by Mrs. Patterson, or by the Railroad Company (Rec., pp. 17, 23); Exh. No. 3, Rec., p. 9), and both were kept by the Railroad Company in this unexecuted form until November, 1898, when they were exhibited to Winslow in the office of the Railroad Company by one of its agents (Rec., pp. 17, 23). It will be observed that this lease, signed by Winslow alone, also contained the clauses giving the company the privilege of purchase and also the privilege of renewal (Rec., pp. 9, 10.)

On the 4th of August, 1897, the Railroad Company addressed a letter to Judge Cox, requesting a renewal of the lease of October 17, 1892, for the further term of five years (Rec., p. 10). On the 8th of August, 1897, Judge Cox replied, advising the company that he was no longer trustee that Mr. Jay was in Europe, and giving Mr. Winslow's address (Rec., pp. 49, 50).

On the 10th of August the Railroad Company, by its agent, addressed a communication to Messrs. Cox, Winslow and Jay, as trustees, requesting a renewal of the unexecuted lease of October 17, 1892, for the further term of five years, which communication was sent to Mr. Winslow (Rec., p. 50). To this communication Mr. Winslow, on the 27th of September, 1897, replied as follows (Rec., p. 50):

> "In reply to your letter in relation to the renewal of the lease of the lots in square 710 of this city, I beg to say that we are now prepared to convey the

property with a perfect title, and prefer executing such conveyance to renewal of the lease.

"Very truly yours,

"FRANCIS WINSLOW,

"*Trustee.*"

In the fall of 1898 Mr. Winslow and Mr. McCubbin, the agent to the Railroad Company, had an interview on the subject of a renewal of the lease, at which no agreement was reached, Mr. Winslow denying the right of the company to a renewal of the lease (Rec., pp. 37–41).

On the 25th of January, 1899, Mr. Winslow wrote to the railroad company's agent, telling him that he had received the opinion of counsel on the subject of the lease to the effect that the lease of 1892 was then inoperative, first, because it was never properly executed, and, second, because, no matter how executed, it had lapsed in August, 1897, and that the company was, therefore, a tenant by sufferance and its tenancy subject to be terminated by ordinary process in a magistrate's court. The letter also offered to negotiate for a new lease on new terms, or for sale of the property (Rec., p. 56). The company's agent replied, acknowledging the letter of Winslow, and proceeds thus (Rec., p. 56):

> "On the other hand, our counsel advises me that we have the right to tender the money and demand a deed, but as I do not have an appropriation for this particular purchase, we prefer to arrange a lease, say, for two years, with the privilege of another year, at the same rental as the present lease, leaving out, if you prefer, the option to purchase.
>
> "This will tide us over until after the reorganization, when we will be in better shape to arrange for the purchase of the lot, if it is found to be necessary for our purposes."

The above letter was dated *February 28, 1899*; evidently from its context and the letter of Mr. Winslow of January 25, 1899, an error in the date, which should have been *January 28.*

On the 15th of February, 1899, Mr. Winslow answered the letter of Mr. McCubbin, declining his proposition to lease, and stating—

> "we prefer to sell the property rather than lease it, but neither in case of sale or lease could we be governed by conditions or prices existing some twenty-five years ago" (Rec., p. 57).

Mr. McCubbin, on the 18th of February, 1899 (Rec., pp. 12–13), replied to Mr. Winslow's letter of the 15th of that month, stating that the company's law officers insisted that the company had the right to purchase the property under the terms of the lease and giving the reasons upon which that claim of right was based. Without waiving the company's rights, however, he invited a proposition for a new lease and says (Rec., p. 12):

> "The present status of the company makes it a little troublesome to purchase property at this time, and therefore we would prefer a proposition to lease. This, I understand, you are willing to do, if we can agree upon the rental."

And he concludes said letter with the following statement:

> "To avoid any controversy at this time, I would be willing to take up the question of the amount of rental, based not upon the old lease, but upon the present value of the property" (Rec., pp 12–13).

It appears from Mr. McCubbin's letter of April 21, 1899, and Mr. Winslow's reply thereto of April 27, 1899 (Rec., p. 58), that a proposition had been submitted by Mr. Winslow in a letter of March 11, 1899, which does not appear in the record, but which was not accepted. In his letter of April 21, 1899, Mr. McCubbin again asserts the right of the company to purchase "under the agreement of October 17, 1892," and then makes an offer to purchase the property for $12,592 (Rec., p. 58).

On the 23d of January, 1900, the railroad company addressed a communication to Walter S. Cox, Francis Winslow, and Augustus Jay, as trustees of Mrs. Eliza W. Patterson (Rec., p. 13). In this letter the company declines the offer made to it through the counsel of the trustees under the will to lease the lots for a term of six years at an annual rental of $1,500, and offers to lease the property for such time as it may require the same for $1,000 per annum. In this letter the company renews the assertion of its right to purchase the property and offers to pay the purchase price named in the lease, upon the presentation of a proper deed.

Negotiations between the parties having thus failed, on January 23, 1900, notice was given to the railroad company to vacate the premises, acknowledgment of the receipt of the same being made on January 29, and on March 8, 1900, proceedings for possession under the landlord and tenant laws of the District were instituted, resulting in a judgment in favor of the trustees, without contest (Rec. p. 20). On the 24th of April, 1900, the railroad company appealed from the judgment of the justice of the peace to the Supreme Court of the District of Columbia, where the appeal is still pending, as appears by the eleventh paragraph of the bill and the eleventh paragraph of the answer (Rec., pp. 5, 6, 20).

On the 15th of August, 1900, the trustees under the will instituted a suit at law to recover $6,500, as compensation for the use and occupation of the real estate, which is also still pending (Rec., p. 6).

On the 4th of October, 1900, before either of said proceedings were reached for trial, the bill in this cause was filed.

The lots in controversy contain 41,975 square feet (Rec., p. 49). The rent reserved in the lease for this property is $755.55, and the price at which complainant seeks to purchase the fee is fixed in the lease at $12,592.

Only two witnesses were examined in the case as to the fee simple and rental values of the property, both being witnesses for the complainant. The testimony of Mr. Stell-

wagen is that the fair value of the ground is from sixty-five to seventy-five cents per square foot (Rec., p. 45). On this basis the total value of the land in controversy would be from $27,283.75 to $31,481.25.

Mr. Turpin testified that the fair rental value of the lots would be 5 per cent on the fair value of the property (Rec., p. 48), which would make the rental on the basis of Mr. Stellwagen's valuation from $1,364.18 to $1,574.06 per annum.

It will thus be seen that the complainant in its bill seeks to acquire this trust property from the trustees at a valuation of from $14,691.75 to $18,889.25 less than its present value, and to enforce a renewal of the lease at a rental of from $608.63 to $818.51 per annum less than its present fair annual rental value, as established by the testimony of its own witnesses.

Neither Mrs. Patterson nor the remaindermen, *cestius que trust* under the will, are made parties to the cause.

The bill does not allege the use to which the property is put, nor was any evidence offered on that subject.

It is nowhere alleged in the pleadings nor is any evidence offered tending to show that the company had any other foundation for right or claim to the property than such as resulted from the several leases set out in the record and hereinbefore referred to.

The Court of Appeals held that the lease executed by Winslow alone was valid and binding, and that under it the company was entitled to a renewal for five years from August 1, 1897 (Rec., p. 83).

The Court of Appeals denied, however, the right of the complainant to a specific performance of the alleged contract of sale contained in the lease, as prayed in its bill, saying (Rec., p. 82):

"We do not think that the contract is one of which specific performance should be decreed in equity under the circumstances of this case."

But the Court of Appeals in its opinion, held that (Rec., p. 76):

> "By an act of Congress of July 25, 1866 (14 Stat. 250), the Baltimore & Ohio Railroad Company had been authorized to extend the Metropolitan branch of its road into the District of Columbia, with the same rights as it held in Maryland, including the right to acquire property by purchase or condemnation for the construction and use of the road; and subsequent statutes empowered it to extend said branch into the city of Washington over a specified route. This route comprised the lots of ground hereinbefore mentioned."

The Court of Appeals also held that (Rec., p. 81):

> "Over and through this land the railroad company constructed what is known as its Metropolitan branch, part of a great highway between Washington city, the adjoining States and the great West. . . . It is very clear that the appellees knew the purpose for which the land was needed, and for which it was subsequently and is now used; and that, with full knowledge of such purpose and intending that such purpose should be carried into effect, they authorized the railroad company to enter upon the land and to construct the road thereon."

The Court of Appeals also held that (Rec., p. 82):

> "In the present case the railroad company has another remedy, plain and adequate, whereby to preserve its own rights and those of the public in the premises; that of the exercise of the right of eminent domain vested in it by its charter and by the act of Congress which authorized its entrance into this city and District; and it is both its right and its duty to exercise that right by taking steps in the present suit or otherwise, as it may be advised, to ascertain the

> value of the use and occupation which it desires of the land in question and to make compensation therefor to the owners of the land."

And again (Rec., p. 83):

> "We are also of opinion that, for the time subsequent to the determination of said renewed lease for which the appellant shall require the use and occupation of said land, the appellant is entitled and it is its duty to acquire the right to such use and occupation under the exercise of the right of eminent domain conferred upon it by the act of Congress, by the ascertainment of the value of such use and occupation, and payment to the owners of the land of the just compensation so to be ascertained."

This was an entirely new theory of the complainant's case, not suggested by the pleadings, nor touched upon by evidence. It is nowhere alleged that the said lots are occupied by any of the company's tracks, or that they lie within the line of its right of way, or that they were or are subject to its right of condemnation under a power of eminent domain delegated to it by Congress, but, on the contrary, it bases its entire claim of right in this case upon matter of contract, and that contract a right of purchase contained in a lease.

It will be contended in this brief, entirely apart from the question of departure involved in this new theory of the complainants' case, that the complainant was not vested with the right of condemnation of this property through the exercise of the power of eminent domain; that no act of Congress conferred such power upon it, but that, on the contrary, such right was *in express terms denied to it.*

The particular acts of Congress supposed to confer the power to condemn this property not being indicated in the record, counsel has for the convenience of the court printed all the acts relating to the road up to the time of this transaction in an appendix to this brief.

The effect of the decree of the Court of Appeals is to confer upon the railroad company the right to the use of the property for the period of five years from the first day of August, 1897, at $755.55 per annum, or for the sum of $3,777.75 against the appellants' claim of $2,400 per annum for the same time, or $12,000 and perpetually to enjoin the prosecution of their suit for possession, and for the $6,500 accrued for such use and occupation, thus incurring a pecuniary loss to appellants of $8,222.25.

The further effect of the decree of the Court of Appeals was to decree *in thesi* as to the future rights of parties after the expiration of all rights under the lease, the sole subject matter of the suit. It decrees to the complainants the right to exercise, *in the future*, the power of condemnation over the appellants' property, without giving the appellants an opportunity to be heard as to whether right to exercise the power of eminent domain over appellants' property was vested in the complainant or not, against the appellants' constitutional rights.

ASSIGNMENT OF ERRORS.

I.

The court erred in holding that the complainant was entitled to a renewal of the lease after July 31, 1897.

II.

The court erred in holding that the lease of October 17, 1892, signed by Winslow alone, conferred any rights upon the complainant.

III.

The court erred in holding that the complainant was at any time vested with the power of condemnation of the land described, under the right of eminent domain.

IV.

The court erred in not affirming the decree dismissing the bill.

V.

The court erred in enjoining the appellants from prosecuting their actions at law for the recovery of possession and for compensation for the use and occupation of the premises.

ARGUMENT.

I.

The Court Erred in Holding that the Complainant was Entitled to a Renewal of the Lease After July 31, 1897.

The lease dated January 30, 1888, was for the term of five years from August 1, 1887, and was formally executed by all the parties to it, but not by Mrs. Patterson (Rec., pp. 24–5).

It contained an agreement for renewal in the following terms:

> "And further that at or before the expiration of the term aforesaid, at the request of said party of the second part, its successors and assigns, they will renew the lease, with the same agreements and privileges as herein contained for another term of five years or until such time as the said parties of

> the first part shall be prepared to convey the said premises as hereinbefore agreed, with the perfect title in fee-simple thereto." (Rec., p 25.)

This was equivalent to a lease for five years certain, and for ten years at the option of the Railroad Company or until July 31, 1897.

This covenant does not amount to a perpetuity but gives the right to but one renewal.

In Hyde v. Skinner, 2 P. Wms. 196 (1723) the lease contained a covenant "to renew the Lease at the same Rent and on the same Covenants." Lord Macclesfield, in decreeing a new lease, said (p. 197):

> "Tho' the Lease is to be made on the same Covenants, yet that shall not take in a Covenant for the Renewing this new Lease; forasmuch as then the Lease would never be at an End."

In Tritton v. Foote, 2 Brown Ch. 636 (1789) the covenant was (p. 637) to—

> "execute a new lease of the said demised premises, for the further term of seven years to commence from the end of said term of twenty-one years thereby demised, subject to the same rents, and pursuant to the same exceptions, covenants, reservations, conditions, and agreements in all respects as are in and by the said indenture of lease mentioned and expressed."

The lessor refused to execute a new lease tendered to him, because it contained, in addition to all the other covenants, a covenant for renewal. The Chancellor, Lord Thurlow held the plaintiff entitled to a lease for seven years only, and said (pp. 638–639):

"that he had not an idea that the intention of the lessor was to renew the covenant of renewal, or that it could be so construed in a Court of Equity."

In Moore v. Foley, 6 Ves. Jr. 232 (1801), the covenant was (p. 233) to renew "under, the like rents, covenants and conditions, as were therein mentioned and contained." The Master of the Rolls, Sir William Grant, in disposing of the case, said (p. 237):

> "I agree with the late *Master of the Rolls in Baynham* v. *Guy's Hospital*; who says, 'I collect therefore from these cases this; that the Courts, in England at least, lean against construing a covenant to be for a perpetual renewal; unless it is perfectly clear, that the covenant does mean it. *Furnival* v. *Crew*, 3 Atk. 83, which is relied on in *Cooke* v. *Booth* (Cowp. 819), had clear words for a perpetual renewal; which made it impossible to construe it otherwise.'
>
> "There being no clear words in this case, nor any words relative to perpetual renewal, but the parties themselves having limited it, the question is whether the proviso, that the renewal shall be under the same rents, convenants, and conditions as the first lease shall in the absence of more positive stipulation amount to a perpetual renewal. Upon *Tritton* v. *Foote* and *Russell* v. *Darwin* I am bound to hold, that a covenant for renewal under the same covenants does not include the covenant to renew, but that it means only a second lease, not a perpetuity of leases."

In Rutgers *vs.* Hunter, 6 Johns. Ch. 215 (1822) Chancellor Kent says (p. 219):

> "If a covenant to renew the lease, necessarily included a renewal of all the covenants in it, it would be tantamount to a covenant for perpetual renewal,

> and so extraordinary a covenant ought not to depend on inference merely."

In Piggot v. Mason, 1 Paige Ch. 412 (1829), the lessor covenanted with the lessee to renew the lease at the expiration of the term, at a fair valuation, by persons indifferently chosen between the parties. On a bill for specific performance Chancellor Walworth decreed a renewal of the lease, saying (p. 415):

> "The new lease must be for a similar term, and with the like covenants and conditions inserted therein, except the covenant for renewal, which the complainant is not entitled to have inserted in the new lease, as that would, in effect, create a perpetuity."

In Carr v. Ellison, 20 Wend. 178 (1838), the lessor covenanted that he would—

> "renew the lease unto the said *William Corwin*, his executors, administrators or assigns, for the term of twenty-one years more, for and under the same yearly rents, and *under the same covenants* as is herein before granted."

The court, per Bronson, J., in passing upon the contention of the plaintiffs in error that they were entitled to more than one renewal under these covenants, says (p. 179):

> "On the construction for which the plaintiffs in error contend, the lessor covenanted in case the value of the buildings was not paid for a perpetual renewal of the lease; in other words, he agreed to renew the covenant for a renewal, as well as the other covenants contained in the lease. The courts lean against such a construction of the contract as will lead to a perpetuity, and will not infer an agreement

> for a second renewal from a general provision for a renewal of the lease with similar covenants."

And the court further says (p. 180):

> "Although the lease was not in fact renewed at the end of the original term, the lessee and those claiming under him, had held the property for a second term of twenty-one years before this action was brought, and they have no longer any right to the possession either at law or in equity."

In Cunningham v. Pattee, 99 Mass. 248 (1868), construing a covenant to renew, the court said (p. 252):

> "The covenant to renew is not avoided for indefiniteness. The word, *ex vi termini*, imports the giving a new lease like the old one, with the same terms and stipulations; at the same rent and with all the essential covenants. . . . To this rule there is one exception, equally well established with the rule itself. The renewal covenant is not to be inserted in the new lease; that agreement is satisfied and exhausted by a single renewal. An agreement to lease *toties quoties* will not be inferred, in the absence of words clearly pointing to that intention."

In Banker v. Braker, 9 Abb. (N. S.) 411 (1880) the court said (p. 414):

> "The courts lean against such a construction of an agreement between landlord and tenant as will lead to a perpetuity, and will not infer an agreement for a second renewal from a general provision for the renewal of the lease with similar provisions."

In Syms v. The Mayor, 105 N. Y. 153 (1887), the city of New York executed a lease to Peter Lorillard for thirty years, ending on the 1st of May, 1840, and the lease con-

tained a renewal covenant in which the city agreed to redemise the premises to him for—

> "and during the term of twenty-one years thereafter, with a like covenant for after renewals of the lease as is contained in this present indenture."

In considering this covenant the court said (p. 157):

> "We are of opinion that the verdict was properly directed. The lease executed in 1810 will not be so construed as to create a perpetuity. *Rutgers* v. *Hunter*, 6 *Johns. Ch.* 215; *Carr* v. *Ellison*, 20 *Wend*, 178; *Piggot* v. *Mason*, 1 *Paige*, 412; *Banker* v. *Braker*, 9 *Abb.* (N. C.) 411. Its language is satisfied by holding that it gave the lessee the right to two renewals, and those renewals were subsequently given; and it must be assumed that the parties so understood the first lease."

The effect of these decisions beginning in England in 1723 (2 P. Wms. 196), and extending down to 1887 in New York (105 N. Y. 153), is thus expressed in Taylor's Landlord and Tenant:

> "Sec. 333. Nor will a general covenant for renewal be construed to imply a perpetual renewal; the most a lessor is bound to give on such a covenant is a renewal for one term only. A covenant to renew a lease 'under the same covenants contained in the original lease' is satisfied by a renewal of the lease for another term, omitting the covenant to renew; for if the continued grant of successive leases and not a single renewal only had been intended, words, it was said, would naturally have been made use of indicating such an intention. A different construction would virtually lead to a grant in perpetuity; and where no consideration appears for a grant of so extensive a nature, such can not be the reasonable construction. Under certain circumstances a grant

> of this character may not be unreasonable; but still in every case the intention must be expressed without ambiguity."
>
> "Sec. 334. A covenant which does not plainly imply or express a perpetual renewal, will not, as we have said, be construed to give this right."

A further reason for limiting the covenant for renewal to a single renewal is the lack of power in the trustees to create a perpetual lease.

As before shown, the only title of the trustees and their only power over the property is confined to the life of Mrs. Patterson, after which the estate devolves upon the remaindermen, unaffected by any trust.

A perpetual lease would bar the remaindermen's rights of possession and sale, and is therefore beyond the power of the trustees. Moreover, it would absolutely defeat the right. expressly given to the beneficiary of the trust, Mrs. Patterson, by the will,—

> "to occupy possess and use for her own account, accommodation & convenience, & that of her family, any part of the property, real & personal, so held for her separate use and benefit" (Will, Rec., p. 27).

The most, therefore, that the Railroad Company could claim, under the lease of January 30, 1888, was a term for five years from August 1, 1887, and a single renewal thereof for five years or until July 31, 1897.

II.

The Court Erred in holding that the Lease of October 17, 1892, Signed by Winslow, alone, Conferred any Rights upon the Complainant.

Assuming that the trustees had the power to make the leases and covenant to renew the same, it appears by the record that the last lease executed by the parties is the one dated January 30, 1888, for five years from August 1, 1887 (Rec., p. 24).

This lease was made in the name of all the trustees and the railroad company, and was executed by all the parties to it, but not in any way assented to by Mrs. Patterson.

By its terms, it expired July 31, 1892, and if the covenant for renewal therein contained be admitted to be valid, it would have entitled the appellant to a single renewal for the further term of five years from August 1, 1892, which would expire July 31, 1897.

No formal lease was necessary to effect this renewal, but upon the demand of the company the right to the extension until July 31, 1897, would have been absolute under the lease of 1888 without any further written instrument. It was perfectly competent, however, for the parties, in 1892, upon the expiration of the term in the lease of 1888, to execute a new lease for the single term of five years therein provided for, in satisfaction of the covenant to renew, but, as above shown, they could not be required to include in such lease a clause for a further renewal, as that would create a perpetuity.

The lease of October 17, 1892, signed by Winslow alone, was not intended as a new and independent obligation of Winslow alone, but was prepared by the complainant (Rec., p. 23) in the *name of all the trustees* to be executed by all (Rec. pp. 9, 10) as a fulfillment of their joint obligation un-

der the lease of 1888 and was signed by Winslow in the belief that it was in accordance with the requirements of the previous lease (Rec. p. 23), and sent to Fisher & Co., with instructions to see that it did conform with the obligations of the lease of 1888 *before delivering it to the company* (Rec., p. 67).

Winslow, in this, was not making a new lease, nor executing a renewal of his *own* contract, but only executing, so far as he was concerned, *his part* of the contract of renewal made by Cox, Jay and Winslow in their lease of 1888, the terms and obligations of which he, as *one* of the *three* covenantors had no power to vary or enlarge.

Had it been submitted to Jay, he could have refused to execute it, or to allow it any effect, for the very reason that it contained a covenant to renew *in excess* of the obligation in the covenant of the previous lease which it was designed to fulfill.

The trustees never having agreed to give a second renewal of the lease of 1888, and being under no obligation to do so, the inadvertent and accidental act of Winslow, alone, in signing a lease which improperly contained such a renewal clause, could not bind his co-trustees nor the trust estate committed to their care.

In Sinclair v. Jackson, 8 Cow. 543, the court, after considering whether trustees could act through an attorney, said (p. 582):

> "Be that as it may, another objection is raised, which applies to both the leases, and appears to me to be insuperable. It is, that they were not executed by all the trustees who were living at the time. Mrs. Maunsell is not a party to either of them. She executed the first letter of attorney to Clarke, but did not join in the second."

After considering whether or not the lease may have been executed under the first or second power of attorney and the

orders in chancery authorizing the making of the lease, the court said (p. 583):

> "If so, it might furnish an answer to the objection made to the leases for the want of power in the trustees to lease; but is no answer to the objection, that the trustees do not all join in the lease, for their concurrence in the act was as necessary under the order of the court as under the will of the testatrix. The order authorized them, or the survivor or survivors of them, to lease, and that was the authority they derived from the will. Then was it necessary for them all to join in the lease, as demising parties, to make it effectual in law? It is a settled rule, that when a trust or authority is delegated for mere private purposes, the concurrence of all who are intrusted with the power is necessary to its due execution. (*Green* v. *Miller*, 6 John. 39; *Franklin* v. *Osgood*, 14 Id. 560; 1 Caines' Cases in Error, 16; Sugd. on Powers, 162, 263.) The powers of the trustees, whether express or implied, must be executed strictly, and the principle applies equally to trusts or powers coupled with an interest, and where the trust or power will survive, as to mere naked authorities, and the leases not being executed by all the trustees who were living, are absolutely void."

The court further says (p. 583):

> "It was urged, that if the leases were defectively executed, the *cestui que trust* alone could take advantage of the defect, and that the plaintiff below could not object to them on that ground. That principle might apply to a voidable lease; but these leases are not merely defective and voidable, but absolutely void; and a stranger may object to a void instrument, for it is a nullity."

In Ridgley v. Johnson, 11 Barb. 527, a deed prepared in the name of three trustees, but executed only by two of them, is held to be void, the court saying (p. 535):

> "The judge, at the circuit, was undoubtedly right in holding that the settlement deed, executed as it

> was by only two trustees, was void, for the third trustee was in fact living at the time of execution. The power of trustees over the subject matter of the trust is equal and undivided. They can not, like executors, act separately—all must join both in receipts and conveyances."

Hill on Trustees (3d Am. Ed.), 445 (*page 305):

> "Trustees have all equal power, interest and authority, with respect to the trust estate. As a general rule, therefore, they can not act separately, but they must all join in any sale, lease or other disposition of the trust property, and also in receipts for money, payable to them in respect of their office. And in this respect they differ materially from executors, who have a joint and entire authority, and any one of whom may effectually bind, or dispose of, the assets by his own individual act."

In Latrobe v. Tiernan, 2 Md., Ch. D. 474, the chancellor said (p. 480):

> "The general doctrine does not appear to admit of dispute, that trustees have all equal power, interest and authority, and can not act separately, as executors may, but must join, both in conveyances and receipts. For one trustee can not sell without the other, or make a claim to receive more of the consideration money. As a general rule, says *Hill on Trustees*, 305, 'trustees can not act separately, but they must all join in any sale, lease or other disposition of the trust property, and also in receipts for money payable to them, in respect of their office.' And the cases, so far as I have been referred to them, are uniform in maintaining this as a general rule. They are referred to in the passage quoted from Hill, and in *2d Story's Eq., section* 1280 *in the notes.*"

Whatever rights, if any, the railroad company may have had to a renewal under the executed lease of January 30, 1888 (Rec., pp. 24, 25), and the covenant for renewal therein

contained were satisfied by the railroad company's full enjoyment of the property from August 1, 1887, to July 31, 1897.

The unauthorized inclusion in the lease of October 17, 1892 (Rec., pp. 9, 51, 52) of the *covenant for renewal*, whatever might have been its effect had the lease been executed by all the trustees, was a mere nullity, because signed by only one of the trustees, entirely apart from any question of power under the will.

The Court of Appeals has, in effect, held, that the inadvertent signing, by *one* of the trustees, of a lease, intended to fulfill the covenant for renewal contained in the previous lease, but improperly containing a covenant for a *further renewal* which the *complainant had no right to demand and the covenantors had the right to refuse*, has the effect of extending and enlarging the covenant of the covenantor who did *not* sign and who *could have refused to sign it*. Also that it binds the beneficiary of the estate and *all* the trustees to *two* renewals instead of *one*, as stipulated in the covenant of their lease of 1888.

Thus by *accident*, or by the *negligence* of *one* trustee, the complainant, for *no new or additional consideration*, is held to be entitled to a *second* renewal of the lease of 1888, when the complainant and the covenantors contracted for but one renewal.

III.

The Court Erred in Holding that the Complainant Was, at Any Time, Vested with the Power of Condemnation of the Land Described, Under the Right of Eminent Domain.

The purpose of the bill was to secure the specific performance of an alleged contract to sell and convey the lots described in the bill. The sole foundation of the complainant's demand was the leases containing the alleged

contract of sale, and the pleadings and evidence made no allusion to the existence of any right in the land independently of the leases.

Even if the complainant were vested with the right to condemn the land, under the exercise of the power of eminent domain, and that fact had been proved in the cause, it could not have availed the complainant because it is not made a ground of the relief sought, nor even alluded to in the pleadings.

In Koehler v. Black River Falls Iron Co., 2 Bl. 715, a bill was filed to foreclose a mortgage. The mortgage was regular on its face, but the answer denied that it had been validly executed and averred that the seal of the corporation had been surreptitiously affixed. The evidence conclusively established that the seal had been wrongfully affixed; this was decisive of the case (pp. 716, 717). This court held the mortgage to be "invalid and of no force and effect as a legal mortgage" (p. 718). To escape the consequence of this situation it was contended that if not good as a *legal* mortgage, yet, on the facts, it could and should be enforced as an *equitable* mortgage. With reference to this contention this court said (p. 718):

> "It is argued, that if not a legal mortgage, it is an equitable one, and that the court should not have dismissed the bill, but granted such relief as equity could give. But *this* bill seeks a foreclosure on the *sole* ground that a legal mortgage was given.
>
> "If the complainants have any rights under this instrument as an equitable mortgage, they can be tested, on a proper bill filed in another suit."

In Grosholz v. Newman, 21 Wall. 481, a bill was filed to have an absolute deed of conveyance canceled on the ground that it conveyed homestead land and was void because the wife of the grantor did not join in the execution and by reason of an adverse possession by the grantors (pp. 486–7). At the argument it was claimed that the deed was given as

a mortgage which had been paid. As to this contention the court said, by Mr. Chief Justice Waite (p. 488):

> "It is next urged in the argument that the deed was given as a mortgage to secure a debt which has been paid.
>
> "There is no allegation in the bill to support this claim. The recovery must be had upon the case made by the pleadings or not at all."

In Foster v. Goddard, 1 Bl. 506, this court, by Mr. Justice Swayne, tersely states the rule thus (p. 518);

> "In equity proceedings the proofs and allegations must agree. A party can no more succeed upon a case proved, but not alleged, than upon a case alleged, but not proved."

In Harrison v. Nixon, 9 Pet. 483, this court, by Mr. Justice Story, said (p. 502):

> "Every bill must contain in itself sufficient matters of fact, *per se*, to maintain the case of the plaintiff; *so that the same may be put in issue by the answer, and established by the proofs.* The proofs must be according to the allegations of the parties, and if the proofs go to matters *not within the allegations* the court can not judicially act upon them as a ground for its decision, *for the pleadings do not put them in contestation.* The allegata and the probata must reciprocally meet to conform to each other."

In the case of Eyre v. Potter, 15 How. 42, the court, by Mr. Justice Daniel, said (p. 56):

> "And here it may be proper to premise, that in the examination of the case made by the bill, it can not be considered as one of constructive fraud, arising out of some peculiar relation sustained to each other by the complainant and the defendants, and therefore to be dealt with by the law under the necessity for protecting such relation, but it is one of actual, positive fraud, charged, and to be judged of, according to its features and character, as delineated

by the complainant, and, according to the proofs adduced to establish that character. Although cases of constructive fraud are equally cognizable, by a court of equity, with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated. In support of this position may be cited, as directly in point, the case of Price v. Berrington, decided by Lord Chancellor Truro, in 1851. *Vide* English Law and Equity Reports, Vol. 7, p. 254."

In the case of Reynolds v. Stockton, 140 U. S. 254, this court affirmed the judgment of the Court of Chancery of the State of New Jersey, refusing to give effect to a judgment of one of the courts of the State of New York because the subject-matter of the judment sought to be enforced was not within the issue created by the pleadings and tried before the court rendering the judgment.

Mr. Justice Brewer, delivering the opinion of this court, quotes from the case of Munday v. Vail, 34 N. J. Law, 418, *inter alia*, the following passages (pp. 268, 269):

> "The inquiry is, had the court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, *the point decided must be, in substance and effect, within the issue.*"
>
> . . . . . .

> "A judgment upon a matter outside of the issue must, of necessity, *be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard.* And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants."

Commenting upon the case of Munday v. Vail, and the quotations from the opinion in that case, this court, through Mr. Justice Brewer, says (p. 269):

> "We regard the views suggested in the quotation from the opinion as correct and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes.*"

It is nowhere suggested in the pleadings or evidence in this case that the property in question in this suit was within the line of the right of way of the Railroad Company. It is nowhere alleged that the company had, or claimed to have, the right to condemn the same to its use under the power of eminent domain. It is nowhere alleged or proved that the property was occupied for the purpose of the roadbed of the company, nor is the purpose of the bill declared to be to maintain the tracks of the company on the land. The only reference to the construction of the road contained in the pleadings is in the third paragraph of the bill, which is as follows (Rec. p. 2):

> "Third: That in 1871 and 1872 when its Metropolitan branch was being constructed within the District of Columbia by the Baltimore and Ohio Railroad Company, this complainant, negotiations were entered upon by and between said company and

Carlisle P. Patterson, William H. Philip and Walter S. Cox the original trustees under the will of Catherine Pearson deceased for the purchase of lots numbered nine (9), ten (10), eleven (11) and twelve (12) in square numbered seven hundred and ten (710), the said described lots belonging to the estate of said Catherine Pearson and their possession being useful to said company in the construction of the said Metropolitan branch".

The first prayer of the bill (Rec. p. 6) is for process. The second prayer of the bill is as follows (Rec. p. 6):

> "That said defendants, trustees, as aforesaid, be *decreed to convey to this complainant the lots described herein at the price and according to the terms of said lease of August first 1872, and the several extensions or renewals thereof*, and *if necessary for such conveyance to execute a formal lease of said lots to this complainant for the term of five years from the first day of August, 1897*".

The third prayer (Rec. p. 6) is for a preliminary restraining order against the prosecution of the two proceedings at law for recovery of possession and compensation for use and occupation. The fourth prayer (Rec. pp. 6–7) is for a perpetual injunction against the prosecution of those suits. And the last prayer (Rec. p. 7) is for general relief.

Under these pleadings the language of Mr. Justice White delivering the opinion of this court in Warner v. Godfrey, 186 U. S. 365, 377, may be appropriately applied.

> "Obviously, the defendants . . . did not on the trial introduce any evidence to rebut a claim which was not made and which was in substance at war with the theory of the case propounded against them."

The suggestion of any rights in the Railroad Company under any supposed power of condemnation through the right of eminent domain, or because of the actual establish-

ment of its right of way over the land in controversy, upon which the Court of Appeals preferred to rest its judgment, as stated in its opinion (Rec. pp. 81–83), was not made in the trial court, as appears from the opinion of Mr. Justice Barnard dismissing the bill (Rec. 71–73), but was made, for the first time, in the Court of Appeals in the brief of counsel for the Railroad Company, appellants in that court, in which it is very clearly shown how the matter could and should have been stated, in the bill, had it been intended to found the Railroad Company's claim of right wholly, or in part, upon any such theory.

On page 1 of their brief in the Court of Appeals it is stated:

> "By act of Congress dated July 25, 1866 (14 Stat. p. 250), the Baltimore and Ohio Railroad Company was authorized to extend into and within the District of Columbia its Metropolitan branch, and in 1872, when the work of construction of said branch road was under way, the line of said branch, as projected ran through the corner of square numbered seven hundred and ten, in the city of Washington, and it became useful for the company to acquire for the purposes of a right of way lots numbered nine (9), ten (10), eleven (11) and twelve (12), in said square."

It is submitted that a comparison of this passage from the brief of counsel with the third paragraph of the bill of complaint (Rec. p. 2) shows the plainest departure from the theory of the case as presented by the pleadings.

In the conclusion of their brief in the Court of Appeals, counsel for the Railroad Company, appellant there, made the following observations at pages 14 and 15:

> "IX.
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> "There is another view of this case to be taken, and one that grows out of the particular use to which the land in question was put immediately after the lease of 1872, and which has continued down to the

present time, and which, by reason of the character and purpose of the defendant corporation, will continue to exist indefinitely.

"*Immediately after the execution of the lease in 1872 this land was occupied by the Baltimore and Ohio Railroad Company, and made a part of its right of way over which its Metropolitan branch was constructed. This use and occupation was open and notorious and well known to the trustees and to the beneficiaries under the will referred to.* If, therefore, the several contracts and agreements relied on by the company should be found to be impossible of enforcement, yet both the beneficiary and the trustees are estopped from asserting their rights to the land, and from maintaining an action to recover possession.

"*The company was permitted, as stated, to build its tracks over these lots, where they now are, and to make them a part of the right of way and road-bed of a railroad,* in the maintenance of which the public has interests which should be and are protected by courts. It is evident from the testimony in this case that an agreement to purchase was entered into in avoidance of the exercise by the company of the right of condemnation, *and it cannot be denied, under the evidence, that the trustees and Mrs. Patterson knowingly permitted the company to occupy the land in question with its tracks.* Whatever, therefore, may have been the defects in the agreement, or however wanting the trustees may have been in the power to sell, *they, with Mrs. Patterson, stood by and permitted the company to construct its tracks, and they should not now be permitted to undertake or prosecute proceedings which would enable them to sever a line of commerce which, by their assent and even permission, was constructed over these lots and has been in operation for more than a quarter of a century.*"

This court will search the record in vain for a syllable in the pleadings averring any of the facts above quoted or for any evidence tending in the slightest degree to substantiate them.

The Court of Appeals, in its opinion says (p. 81):

> "What the character of the use and occupation of the land by the company was to be, *and was understood by all the parties to be intended to be, we think also to be entirely clear. Over and through this land the railroad company constructed what is known as its Metropolitan branch*, part of a great highway between Washington city, the adjoining States, and the great West."
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> . . . . . .
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> "It is very clear that the appellees knew the purpose for which the land was needed, and for which it was subsequently and is now used; and that, *with full knowledge of such purpose and intending that such purpose should be carried into effect, they authorized the railroad company to enter upon the land and to construct the road thereon.*"

In view of the fact that none of the *cestuis que trust* under the will, Mrs. Patterson nor the remaindermen expectant upon the termination of her life estate, was made a party to the cause, and that, according to the record, no one of the trustees, parties to this proceeding, was a trustee until 1883 (Rec. pp.8–9), eleven years after the original transaction, it can not be perceived how they can be charged with having knowledge of what was intended or done and having acquiesced therein, especially as the bill *nowhere charges such knowledge and acquiescence* and *no testimony was offered to prove it.*

It is submitted, with all due respect to the court below, that the foregoing passages in the court's opinion are not supported by any thing in the record. Had Mrs. Patterson and the other *cestuis que trust* been made parties to this cause, and had the bill charged that the road was constructed upon the lots, and that it was so constructed with the knowledge and acquiescence of said parties, and of the then trustees, such charges could have been answered, the testimony

of Mrs. Patterson and her daughters could have been taken, as well as that of Judge Cox, the survivor of the original trustees. Not having been made parties and no such charge having been made in the bill and no evidence having been offered on the subject, the appellants naturally offered no evidence to repel matter never suggested until after the case was presented on appeal in the Court of Appeals.

Conceding for the purposes of argument, however, that the claims of the Railroad Company, made for the first time in the Court of Appeals, were within the scope of the issues made by the bill, it is respectfully submitted that the Court of Appeals erred in holding that any power existed in the railroad company to use these lots for the right of way of its Metropolitan branch or any other part of its road; but that, on the contrary, it was expressly prohibited from acquiring the same for the use of its roadbed, either by contract or by condemnation proceedings.

The only act of Congress specifically designated in the opinion of the Court of Appeals or in the brief of counsel for the railroad, in that court, is the act of July 25, 1866, 14 Statutes, 250 (Appendix to this brief, pp. 11–12).

By that act the company is given the right to extend what is called, in this case, its Metropolitan branch, into the District of Columbia, and it provides that the company shall—

> "have and exercise the same powers, rights, and privileges, and shall be subject to the same restrictions, in the extension and construction of the said road, into and within the said District as they have, may exercise, or possess, or are subject to within the State of Maryland, under and by virtue of their charter or act of incorporation from the State of Maryland; and shall be entitled to the same franchises, rights, compensation, benefits, and immunities in the use of the said road as are provided in the said charter."

Under this provision, taken in connection with the charter

under the State of Maryland, it is not questioned that a power of condemnation was conferred upon the company *within the District*, as distinguished from the limits of the city.

By the second section of the act, however, an important limitation is placed upon its powers. By that section, it is enacted (App. p. 12):

> "That ALL *the provisions of* the several acts of Congress relating to the lateral road authorized to be built into and within the District of Columbia, by an act passed March second, eighteen hundred and thirty-one, and entitled 'An act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio Road into and within the District of Columbia,' and the supplements thereto, *be and they are hereby, declared to apply to the Baltimore and Ohio Railroad Company* so far as they are severally applicable *to the location, construction, and use by the said company of the road now authorized to be constructed* into and within the said District."

Referring, now, to the act of March 2, 1831, "*all* the provisions" of which are declared to apply to the road here authorized to be constructed, it is found that one of those provisions in *express terms forbids* the company to acquire or use, for its right of way, *squares* or *lots* in the city of Washington.

The first section of that act contains a series of *provisos* limiting the powers given, and among others the following (App. pp. 4, 5):

> "*But nothing herein contained shall be so construed as to authorize the entry by the said company upon any* LOT OR SQUARE, *or upon any part of any lot or square*, owned by the United States, or by any other body or bodies politic or corporate, *or by any individual or individuals, within the limits of the city of Washington*, for the purposes aforesaid, of *locating or constructing the said road*, or of excavating the same, or for the purpose of taking therefrom any material, *or for any other purpose or uses whatsoever;* but the said company, in

> passing into the district aforesaid, and constructing the said road within the same, shall *enter the city of Washington at such place, and shall pass along such public* STREET OR ALLEY, *to such point or terminus within the said city*, as the said company shall find best calculated to promote the objects of said road."

It is submitted that it would be difficult to frame language more specifically forbidding the location of the right of way upon *lots* or *squares*, and more distinctly confining the location of the road to public *streets* and *alleys*.

This restriction was perfectly well understood at the time, and to relieve the company from its restraint, the act of March 3, 1835, 4 Statutes, 757–58 (App. pp. 8–10), gave specific authority to go through certain specified squares, all enumerated in the first section of the act (App. p. 9), but *not including* square *seven hundred and ten*, the square involved in this proceeding.

The second section authorizes the road to traverse the enumerated squares, or any of them, to a point not west or south of the intersection of H street north with Delaware avenue, and from that point the route to final termination of the main stem is—

> "to be surveyed, and approved by the mayor, board of aldermen and board of common council of the city of Washington" (App. p. 9).

The third section of the act is as follows (App. pp. 9–10):

> "SEC. 3. *And be it further enacted*, That if the said route *from the intersection of H street and Delaware avenue* should pass through any *unimproved lots or squares* except public reservations, the said railroad company shall be, and they *are hereby, authorized to construct their road through or over the same*, upon the same terms, and with the same privileges, as are prescribed for passing through the squares enumerated in the first section of this act."

Thus it is seen that so stringent was the provision in the act of March 2, 1831, against locating the road upon any *lot* or *square* within the city, that when it came to the work of actual construction of the branch authorized by the act of 1831, it was necessary to obtain a supplementary act, authorizing the entry, upon specifically enumerated squares, for part of the route, and as to so much of the route as lay west and south of H street and Delaware avenue upon squares not enumerated.

The lots involved in this proceeding are situated about a half-mile northwest of the squares authorized to entered by the act of 1835.

The act of July 25, 1866 (App. pp. 11–12) did not specify the route to be followed by the Metropolitan branch, but only required that the *terminus* of that branch be fixed by agreement between the company and the corporation of Washington.

The Court of Appeals, in its opinion, says (p. 76):

> "By an act of Congress of July 25, 1866 (14 Stat. 250), the Baltimore and Ohio Railroad Company had been authorized to extend the Metropolitan branch of its road into the District of Columbia, with the same rights, as it held in Maryland, including the right to acquire property by purchase or condemnation for the construction and use of the road; and *subsequent statutes* empowered it to extend said branch into the city of Washington *over a specified route. This route comprised the lots of ground hereinbefore mentioned.*"

The habitual and well-known accuracy of the learned judge who rendered this opinion in the court below, and his long familiarity with the affairs of the Railroad Company, are such as to make it a matter of extreme diffidence and hesitation on the part of counsel to question the accuracy of that statement.

Unaided by the citation, either in the opinion of the court

or in the brief of counsel, of any such subsequent statutes, counsel has, in the discharge of his duty to the court and his clients, made diligent search among the statutes at large without being able to discover any such enactment by Congress as is there indicated. If he has inadvertently overlooked such statutes, counsel for the appellee will doubtless cite them in their brief with proper reference to the volume in which they are to be found.

As at present advised, counsel is compelled to contend that the learned Court of Appeals erred, in the statement quoted, as to there being any authority from Congress to the Railroad Company to acquire, by purchase or condemnation, or to use for any purpose whatsoever in connection with the the construction of its road, the lots in square seven hundred and ten.

If it should be shown that counsel for appellants is in error, and that some act of Congress did repeal the restrictions imposed by the proviso in the first section of the act of 1831 (App. p. 4) against entry upon any square or lot, still, the court erred in making a decree upon that ground, because, as before shown, such was not the theory of the bill, and no such right had theretofore been set up in the case, and the defendants never had a hearing with respect to such question.

IV.

The Court Erred in not Affirming the Decree Dismissing the Bill.

The trial court treating the case made by the bill, as it is, solely a case for granting or refusing a decree of specific performance of an alleged contract of sale, refused relief, and dismissed the bill, on the ground that the complainant had not shown a proper case to entitle it to the relief prayed (Rec. pp. 70–73).

This action of the court was entirely correct:

1. Because there never was a valid contract of sale.

2. Because of the gross inequity and lack of mutuality in the alleged agreement of sale.

3. Because no alternative case for relief was alleged, prayed or proven.

4. Because even had a right of condemnation under the power of eminent domain been vested in the company, it must have been exercised in the manner pointed out by the statute, and could not be accomplished through the medium of a court of equity.

1. There Never Was Any Valid Contract of Sale by the Trustees.

Even if the court could properly require specific performance by trustees in such a case, the record here clearly shows that there never was any valid contract of sale to be enforced.

No general power of sale is given to the trustees by the will. The only power to sell the property is conferred in the following terms:

> "And if at any time the said Eliza Patterson shall *in writing to be signed by her in the presence of & to be attested by a subscribing witness* desire the said Carlile P. Patterson, William H. Philip & Walter S. Cox or the survivors & survivor of them to sell any part of the estate real & personal held by them for her separate use *for the purpose of changing the investment thereof*, it shall be lawful for the said named trustees or the survivors or survivor of them to sell the same *for such purpose only.*" (Rec., p. 27.)

Thus it is seen that a necessary condition precedent to the power of sale is a direction by Eliza W. Patterson, "*in writing to be signed by her in the presence of and to be attested by a subscribing witness*" (Rec., p. 27). And such sale shall be "*for the purpose of changing the investment,*" and "*for such purpose only.*"

No such writing is found in the record and no witness testifies that any such ever existed. The only papers in the case signed by Mrs. Patterson are letters asking for or giving directions as to the transmission of rent (Rec., pp. 54, 55, 58–64, 68), and the lease of February 1, 1883 (Rec., pp.8,9). Mrs. Patterson's signature to this lease is not made "in the presence of" nor is it "attested by a subscribing witness" as imperatively required by the will, nor is the *option* given by the lease in any sense a fulfillment of the requirement of the will.

The power to sell being a mere power for a limited purpose must be executed in all respects in strict conformity with the terms of the will creating it.

In Powles *vs.* Jordan, 62 Md. 499, which was an action of ejectment, the court refused to admit in evidence a deed from Jordan as substituted trustee under a deed in trust to William Cock, which gave Mrs. Jordan, the beneficiary of the trust, the power to sell or devise by will all the property over which the power was to be exercised "with the approbation and consent of the said William Cock, and not otherwise" (503–4). The deed was executed with the consent of the substituted trustee, Cock, the trustee named in the deed, having died more than ten years prior to the execution of the deed. The Court of Appeals, in affirming the judgment of the court below, refusing to admit the deed in evidence, says, with reference to this power of sale (p. 504):

> "The confidence in this particular reposed in Cock was entirely personal, and did not belong to the estate, which he held as trustee. It is perfectly well settled by the authorities that where the consent of any person is required to the execution of a power, the condition must be strictly complied with; and if the person, whose consent is necessary, die before the execution of the power, and without having assented, the power is gone. *Sugden on Powers, marginal page 319.* The devise in the will of William Cock can not

> be construed into an assent to the execution of the power. It makes no reference to it in any way. As the deed to Powles purports to be made in execution of this power, and derives all its efficacy from it; and as the power was extinct and incapable of being executed, no title was conveyed to him. The court therefore properly refused to admit the evidence."

In Richardson v. Crooker, 7 Gray, 190 (1856), authority was given the executor to sell real estate which his devisee, the widow, might wish to have sold. The court, in construing this will, held that the executor had no authority to make the sale, saying (p. 191):

> "Besides; the plaintiff did not show, at the trial, any authority to sell the standing wood; and therefore it did not appear that he could, by a sale of it, give to the purchaser any lawful title thereto against the testator's widow and devisee. The testator devised all his real estate, after payment of his debts and charges of administration, to his widow, and authorized his executor (the plaintiff) to sell real estate, for the purposes of paying these debts and charges, only upon the condition that the widow should so direct. No such direction by her has been shown; nor has it been shown that any license to sell real estate has been granted to the plaintiff by the court of probate or even that such sale was necessary."

In Kissam v. Dierkes, 49 N. Y. 602 (1872), the property was conveyed to trustees for the use of Eliza B. Howell by deed which empowered the trustees (p. 603)—

> "whenever they should deem it proper to do so, by and with the consent of said Eliza, manifested by her uniting with them in any conveyance, to grant, bargain and sell, assign and transfer, absolutely and unconditionally, any part or portion of the estate."

The court said of this power (p. 604):

> "The power authorized the trustees to sell the trust property only by and with the consent of Mrs. Howell, to be manifested by her uniting with them in the conveyance. This was a valid condition attached to the power. Mrs. Howell was thereby guarded against any sale being made without her personal sanction. Such must be admitted to have been her intention in annexing this condition to the power. No provision is made for the execution of the power in case of her decease. It could, therefore, only be executed in her lifetime. There is nothing in the Revised Statutes which prohibits the annexing of such a condition or permits it to be disregarded. Mere formalities prescribed by the grantor as to the manner of executing a power may be dispensed with, but essential conditions can not."

In Alley v. Lawrence, 12 Gray, 373 (1859), a marriage settlement gave the trustees power to sell with the consent of the husband and wife, or the survivor of them. The court, considering the marriage settlement, said (p. 374):

> "But the court are of opinion that the plaintiffs had not authority to sell the undivided twelfth of the land in the aforesaid contract. . . . By this settlement the trustees were empowered to sell the real estate, with the consent, in writing, of Mrs. Foster and her husband, or of the survivor of them. By the death of Mr. and Mrs. Foster this power of the trustees was ended. Mrs. Foster, however, by the marriage settlement, retained a power of appointment, under which she might direct, by will, how the property, which was conveyed to the trustees, should be distributed among her children. But she did not retain the power to authorize or appoint a sale during that period. Her will, therefore, gave no power to the plaintiffs to sell the one-twelfth of the aforesaid land. She could not give them that authority. It follows that the defendant rightfully refused to accept their deed of the one-twelfth and pay the stipulated consideration."

In Barber v. Cary, 1 Kern. 397, the property had been conveyed to Albert G. Cary for life with power to sell the same by and with the consent of his mother, Hannah Cary, and his brother, George A. Cary. Hannah Cary died on the 9th of July, 1842, without ever having consented to an execution of the power. Albert G. Cary undertook to convey the land under the power and the subsequent grantee filed a bill to compel the consent of George A. Cary, the surviving party to the execution of the power. In the circuit the relief prayed was granted, which, on appeal to the General Term, was reversed, and judgment rendered for the plaintiff, from which decree the case was carried to the Court of Appeals. The Court of Appeals affirmed the judgment of the General Term, saying (p. 402):

> "Albert G. Cary then took under the devise a life estate, with power to alien the same by grant, by and with the consent of Hannah Cary and George A. Cary. This was a general and beneficial power. The alienation might be made to any alienee whatever, and for the benefit of the grantee of the power alone (1 R. S. 732, Secs. 78, 79). But the power could only be executed on the precise conditions prescribed by the terms of its creation, viz., by and with the consent of Hannah Cary and George A. Cary. The first question is, whether the death of Hannah Cary, which occured before the execution of the power, was fatal to the conveyance. The rule of law is well settled, that when the consent of third persons is required to the execution of a power, that, like every other condition, must be strictly complied with. (*Sugd. on Vendors*, 319; *Simpson* v. *Hawley*, *Prec. Ch.* 472.) If the person whose consent is necessary die before the execution of the power and without having assented, the power is gone, although his death was the act of God. (*Danne* v. *Annas*, *Dyer*, 219 *pl.* 8; *Frahelien's case*, *Mod.* 62, *pl.* 172; *Munsell* v *Munsell*, *Wilmot*, 36.) So where the consent of several persons is required, the death of one of them destroys the power; for the consent of the survivor

will not satisfy the words of the power. (*Atwaters* v. *Birt*, *Cro. Eliz.* 856; *S. C.*, *Noy*, 38, *nom. Atwaters* v. *Bird*; *Butler* v. *Bray*, *Dyer*, 186 *b*; *Wilmot*, 56.)

Not only is there a total failure to comply with the formal requirements of the will, but the provision in the lease, if formally executed as the will required for a valid sale, is not a sale for the purpose of changing the investment as limited by the will. On the contrary, it is a mere *option* to the railroad company to purchase during the term of the lease.

As said by the court below in Jones v. Holladay, 2 App. D. C. 288: "The power to contract for the sale of a lot does not authorize a contract for the sale of an option."

The complainant never attempted to avail itself of this option; the option itself expired by its own terms, and Mrs. Patterson never signed any other paper in anywise relating to the sale of this property.

It is therefore clear that no valid contract for the sale of this property was ever made by the trustees, and that in addition to a lack of proper parties compellable to make specific performance, there was no proper subject-matter, no contract to be specifically enforced, before the court.

2. The Gross Inequity and Lack of Mutuality in the Alleged Agreement is a Bar to its Enforcement by a Decree for Specific Performance.

The property in controversy contains 41,975 square feet (Rec., p. 49) and the purchase price fixed in the several leases and at which the complainant sought to acquire the property is $12,592 or thirty cents per foot. The complainant's own evidence, the only testimony in the cause, shows the value of the property to be from sixty-five to seventy-five cents per square foot (Rec., p. 45), or from $27,287.75 to $31,481.25 for the whole.

It is thus demonstrated that the complainant asks a court of equity to compel the trustees to convey to it the estate of their *cestui que trust* at from $14,691.75 to $18,889.25 less than its value, an act, it is submitted, which a court of equity should rather enjoin than enforce.

The same gross inequity applies to the rental fixed in the lease.

By the testimony of complainant's witness, the fair rental value is 5 per centum on the value of the property (Rec., p. 48), which would be, according to complainant's own proof, from $1,364.18 to $1,574.06 per annum, or from $608.63 to $818.51 per annum more than the rental in the lease.

In addition to this gross inequity in the alleged contract there is an utter lack of mutuality. At no time from 1872 to the filing of this bill could the complainant have been compelled either to renew the lease or to purchase the property at the sum stipulated or at any sum.

The provisions for sale and renewal are wholly at the option of the railroad company, and this optional character is shown and distinctly availed of by the declination of the company to purchase contained in the letter of its agent of February [error for January] 28, 1899, in which he says (Rec., p. 56):

> "Our counsel advises me that *we have the right to tender the money and demand a deed*, but as I *do not have an appropriation for this particular purchase we prefer to arrange a lease.*"

And again, in the letter of February 18, 1899, he says (Rec., p. 12):

> "The present status of the company *makes it a little troublesome to purchase property at this time*, and therefore we would prefer a proposition to lease."

To the first letter above quoted from, after suggesting the lease instead of purchase, is added this statement (Rec., p. 56):

> "This will tide us over until *after the reorganization*, when we *will be in better shape to arrange for the purchase* of the lot, *if it is found to be necessary for our purposes.*"

Thus the company, though asserting the *right* of purchase, declined to exercise it at that time on the score of its own convenience, and even declined to purchase at any future time, unless "*it is found to be necessary for our purposes.*" (Rec., p. 56).

It is submitted that the trustees had no right to place the trust estate at the capricious disposition of the railroad company; that they have not done so in fact; but if they have, such an inequitable contract is not one which a court of equity will specifically enforce.

In Geiger v. Green, 4 Gill, 472, the court says (p. 477):

> "But the contract grants to the appellee the mere privilege of digging ore, and is not compulsory in its character; a privilege, to be exercised, or not, at his pleasure, imposing no corresponding obligations; and if the appellee considered the agreement into which he had entered injurious, and refused to work the mine, it is apparent from every part of this paper, that the proprietor possessed no power to enforce in a court of equity an observance of the contract.
>
> "The practical operation of an agreement of this description, is, that while the appellee may use the mine, if he finds it productive, he may refuse to do so, upon discovering that his purchase is disadvantageous, and the owner of the property would be deprived for years of the revenue, which, under other circumstances, might be derived from it.
>
> "A contract so unequal in its stipulations and bearing, which binds one party, while it leaves the other unfettered, as it respects the observance of its terms, in which there are to be seen no mutual or reciprocal engagements, and which must be regarded, therefore,

as unreasonable and inequitable, can never be enforced by a court of equity."

In Marble Company *vs.* Ripley, 10 Wall. 339, Mr. Justice Strong, delivering the opinion of this court, says (p. 359):

> "Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."

In Brashier v. Gratz, 6 Wheat. 528, Mr. Chief Justice Marshall, delivering the opinion of the court, said (p. 539):

> "Another circumstance which ought to have great weight, is the change in the value of the land. It was purchased at 22 dollars 50 cents per acre. Mr. Brashier failed to comply, and was unable to comply with his engagements. More than five years after the last payment had become due, the land suddenly rises to the price of 80 dollars per acre. Then he tenders the purchase money, and demands a specific performance. Had the land fallen in value he could not have paid the purchase money. This total want of reciprocity gives increased influence to the objections to a specific performance, which are furnished by this great alteration in the value of the article."

And again he says (p. 541):

> "This then, is a demand for a specific performance, after a considerable lapse of time, made by a person

who has failed totally to perform his part of the contract; and it is made after a great change, both in the title, and in the value of that which was the subject of the contract; and by a person who could not have been compelled to execute his part of it, had circumstances taken an unfavorable direction.

"In such a case, we are of opinion, that a court of equity ought to leave the parties to their remedy at law."

In Duvall v. Myers, 2 Md. Ch. D. 401, the Chancellor says (p. 404):

"It is a conceded principle, that this branch of the jurisdiction of the court, is not a matter of right in the parties, and to be demanded *ex debito justitiae*. The application, when this arm of the court is invoked, is addressed to its sound and reasonable discretion, and is granted or rejected according to the circumstances of the case. And as was said by the Court of Appeals in *Geiger et al.* v. *Green*, decided at December term 1846, 'the court must be satisfied that the contract sought to be enforced is fair and just, and reasonable, and equal in all its parts.' The court in the same case, quote with approbation, the doctrine of Lord Redesdale in 1 *Sch. & Lef.*, 18, expressed in these terms, 'I have no conception that a court of equity ought to decree a specific performance in a case, except where *both parties had, by the agreement*, a right to compel a specific performance, according to the advantage which they might be supposed to have derived from it, because otherwise it would follow that the court would decree a specific performance where the party called upon to perform, might be in this situation, that if the agreement was disadvantageous to him he would be liable to the performance, and yet, if advantageous to him, he could not compel a performance.' And after citing other authorities to the same effect, the Court of Appeals say, as the result of the cases, that, 'it is now established, that unless there is to be found *in the contract* this essential ingredient of mutuality, a court of equity will not compel its specific execution,' and in

that very case, the court said a decree for a specific execution would be refused upon the application of the party not bound by the stipulations of the contract, against the opposite party, although the party making application had been in the enjoyment of, and been actually working the ore mine which was the subject of it. In other words, as I understand the decision, the right to a specific execution of a contract, so far as this question of mutuality is concerned, depends upon whether the *agreement itself* is obligatory upon both parties, so that upon the application of either, against the other, the court would coerce a specific performance. If this be the true exposition of the case referred to, and the doctrine is, that this court will not compel one party to perform a contract unless by *the contract itself* the power of the court would be used against the opposite party, if called upon, then it follows that a party not bound by the agreement itself has no right to call upon the judicial authority to enforce performance against the other contracting party, by expressing his willingness in his bill to perform his part of the agreement. His right to the aid of this court does not depend upon his subsequent offer to perform the contract upon his part, when events may have rendered it advantageous to do so, but upon its originally obligatory character, as was said by *Lord Redesdale*, 'this would not be equity, that a party not bound by the agreement itself should be permitted at his option, and when he finds it to his advantage to do so, to compel the other party to perform, when, if the advantage was the other way, he could not himself be coerced to performance on his part.'"

In Parkhurst v. Van Cortlandt, 1 Johns. Ch. 274, Chancellor Kent says (p. 282):

"It is not necessary, here, to insist on another material defect in the agreement, and that is the want of mutuality; for if the defendant were bound to sell or lease, at the election of the plaintiffs, the plaintiffs were not bound to elect or to take either. It would be difficult to deduce any such obligation

from the memorandum; and it seems to be very generally, and very properly, laid down in the books, that a court of equity will never decree performance where the remedy is not mutual, or one party only is bound by the agreement."

3. No Alternative Case for Relief is Alleged or Shown by the Record.

It has already been shown, in the discussion of the third error assigned, that the bill was confined to a sole and specific claim of right and form of relief and that its prayers were appropriate to that and to nothing else.

Under these circumstances, as also there shown, though it may appear to the court through the medium of argument that some ground for relief other than that stated in the bill may in fact exist, the court is without jurisdiction to afford the relief in a case not before it and not put in contestation between the parties, and under such circumstances there is no alternative but to dismiss the bill or remand the cause for amendment.

This latter course can not be pursued unless the supposed facts, ground for relief, actually appear, by evidence in the record before the court and the relief appropriate to such state of facts be of an equitable nature.

4. A Court of Equity Would Have No Jurisdiction of the Condemnation Proceedings.

Even if a right to condemn the land under the power of eminent domain were vested in the company, the statute (App. pp. 4, 5) shows that the proceeding is one at law by a jury under the fifteenth section of the Maryland Act (App. pp. 12, 14) and not within the procedure of equity. There being, therefore, no right in the complainant to the relief sought upon the case alleged in the pleadings, and no case proved

which would be the basis of amendment, and none suggested, even in argument, appropriate to the jurisdiction of equity, the decree of the Supreme Court of the District, dismissing the bill, should have been affirmed.

V.

The Court Erred in Enjoining the Appellants from Prosecuting their Actions at Law for the Recovery of Possession and for Compensation for the use and Occupation of the Premises.

The Court of Appeals, in its opinion (Rec. pp. 81–82), held that because the complainant was a railroad company and the land in question was a part of its right of way, the public interest in the maintenace of this public highway was paramount to that of the individual, and that the Railroad Company could not be dispossessed, if it was willing to make compensation, and that an action for possession could be enjoined, pending the proceedings for the ascertainment and payment of compensation. An examination of the cases cited by the court, in its opinion, will show that the foundation of that rule is that the company *has the lawful right to occupy the land for its right of way.*

The objection to the application of that principle in this case is twofold.

First, what should never be lost sight of in this case, is, that it is nowhere alleged in the pleadings that the land in question is occupied as a part of the right of way of the company, and the bill is not supplied with either allegations or prayers appropriate to such a case.

Second. If it be true in fact, though not alleged in the pleadings or made the ground for relief in the case, that the lots in question are occupied as part of the right of way, still they are *not lawfully so occupied*, because Congress *in express terms* forbade the company from locating, by consent or otherwise, its right of way on any square or lot.

The language of the law is (App. pp. 4–5):

> "But *nothing herein contained shall* be so construed as to *authorize the entry by the said company upon any lot or square,* * * * * * *owned by* * * * * *any individual or individuals, within the limits of the city of Washington*, for the purposes aforesaid, of *locating or constructing the said road,* * * * * or *for any other purpose or uses whatsoever*; but the said company, in passing into the district aforesaid, and *constructing the said road* within the same, shall enter the city of Washington at such place, and *shall pass along such public street or alley*, to such point or terminus within the said city, as the said company shall find best calculated to promote the objects of said road."

If, therefore, the company has constructed a part of its right of way upon these lots, and leased them for that purpose, it has done so in defiance of the act of Congress, and even the express consent of the owner to use it for that purpose could not make its occupation lawful. Congress had the right to perscribe the route of the company and to confine it to the "*public streets and alleys*" and neither the private owner nor the company nor both together could abrogate the statute.

A plain prohibition, such as this is, can not be frittered away by liberal or strained construction. In the case of Pittsburgh and Lake Erie Railroad Co. v. Bruce, 102 Pa. St. 23, one of the cases cited in the opinion of the court below, the court said (p. 33):

> "Corporations take those powers which are conferred upon them by the legislature and *nothing more*. Again, the charter of a corporation must be construed *liberally as to the public*, and *strictly* as to the *grantee*. Commonwealth v. The North East Railroad Co., 3 Cas. 339. The plaintiff in error, however, inverting this rule, would have us construe its charter in such a manner as to give it not only such rights as are therein plainly granted, but also

> such as may be raised by a forced construction of that instrument. This, we need scarcely say, can not be done."

If a part of the right of way of the company is, in fact, constructed upon these lots, it is there in violation and defiance of the express enactment of Congress, and the company can not have the aid of a court of equity to sustain it in its unlawful act.

It is submitted that the decree of the court below should be reversed, the injunction dissolved, and the bill of complaint dismissed.

WM. G. JOHNSON,
Counsel for Appellants.

APPENDIX.

STATUTES REFERRING TO BALTIMORE AND OHIO RAILROAD COMPANY.

[4 Statutes, pp. 268-269.]

Chap. XLVIII.—*An Act to authorize a railroad within the District of Columbia.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the assent of Congress to the constructing a railroad by a company incorporated by the legislature of Maryland, from Baltimore to the city of Washington, be and the same is hereby given to the extent that Congress has jurisdiction of the soil over which it may pass; conceding to said company to exact such tolls, and to enjoy such benefits and privileges, as the act of incorporation of the state of Maryland gives to said corporation within the limits of the state of Maryland: *Provided,* In the location of the road it shall not be lawful for said company to pass through any of the reserved squares or open spaces of the city without the consent of Congress.

Approved, May 9, 1828.

[4 Statutes at Large, pp. 476-479.]

Chap. LXXXV.—*An Act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio railroad, into and within the District of Columbia.*

WHEREAS it is represented to this present Congress that the Baltimore and Ohio Railroad Company, incorporated by

an act of the General Assembly of Maryland, entitled "An act to incorporate the Baltimore and Ohio Railroad Company," passed the twenty-eighth day of February, eighteen hundred and twenty-seven, are desirous, under the powers which they claim to be vested in them by the provisions of he before recited act, to construct a lateral branch from the said Baltimore and Ohio railroad to the District of Columbia. Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the Baltimore and Ohio Railroad Company, incorporated by the said act of the General Assembly of Maryland, shall be, and they are hereby, authorized to extend into and within the District of Columbia a lateral railroad, such as the said company shall construct, or cause to be constructed, in a direction towards the said district, in connection with the railroad which they have located, and are constructing, from the city of Baltimore to the Ohio river, in pursuance of their said act of incorporation: And the said Baltimore and Ohio Railroad Company are hereby authorized to exercise the same powers, rights, and privileges, and shall be subject to the same restrictions, in the extension and construction of the said lateral railroad into and within the said district, as they may exercise, or are subject to, under and by virtue of their said charter or act of incorporation, in the extension and construction of any railroad within the state of Maryland, and shall be entitled to the same rights, compensation, benefits, and immunities in the use of the said road, and in regard thereto, as are provided in their said charter, except the right to construct any lateral road or roads within the said district from the said lateral branch or road hereby authorized, it being expressly understood that the said Baltimore and Ohio Railroad Company shall have power only to construct from the said Baltimore and Ohio railroad one lateral road within the said district, to some point or terminus within the city and county of Washington, to be determined

in the manner hereinafter mentioned; *Provided, always, and be it enacted*, That before the Baltimore and Ohio Railroad Company aforesaid shall proceed to construct any railroad which they may lay out or locate, on, through, or over any land or improvements, or to use, take for use any earth, stone, or other materials, on any land within the said district, they shall first obtain the assent of the owner of such land, improvements or materials, or, if such owner shall be absent from said district, or shall refuse to give such assent on such terms as the said company shall approve, or, because of infancy, coverture, insanity, or any other cause, shall be legally incapable of giving such assent, then it shall be lawful for the said company to apply to a justice of the peace of the county of Washington, who shall thereupon issue his warrant, under his hand and seal, directed to the marshal of the said district, requiring him to summon a jury of twenty inhabitants of the said district, none of whom shall be interested or related to any person interested in the land or materials required for the construction of the said railroad, or a stockholder, or related to any stockholder, in the said company, to meet on the land, or near to the other property or materials so required, on a day named in such warrant, not less than three nor more than fifteen days after issuing the same, to proceed to value the damages which the owner or owners of any such land or other property will sustain by the use or occupation of the same, required by the said company; and the proceedings, duty, and authority of the said marshal, in regard to such warrant and jury, and the oath or affirmation to be administered, and inquisition to be made and returned, shall be the same as are directed and authorized in regard to the sheriff, by the fifteenth * section of the said act of the General Assembly of the state of Maryland, incorporating the said Baltimore and

* For the fifteenth section of the act of Assembly of Maryland, see *infra*, pp. 12-14

Ohio Railroad Company; and all the other proceedings in regard to such jury, and the estimating and valuation of damages, and the payment or tender of payment of any damages ascertained by such valuation and effect thereof, and of the view of any lands, or other property, or materials, as to giving the said company a right to use the same for the use or construction of any railroad within the said district, as hereby authorized, shall in every case, and in every respect, be the same as is provided in and by the above-mentioned act of incorporation in regard to the railroads thereby authorized to be constructed by the said company: *Provided, also, and be it enacted*, That whenever the said company, in the construction of a railroad into or within the said district, as authorized by this act, shall find it necessary to cross or intersect any established road, street, or other way, it shall be the duty of the said company so to construct the said railroad across such established road, street, or other way, as not to impede the passage or transportation of persons or property along the same; and, where it shall be necessary to pass the said railroad through the land of any individual within the said district, it shall also be the duty of the said company to provide for such individual, proper wagon ways across the said railroad, from one part of his land to the other; but nothing herein contained shall be so construed as to authorize the entry by the said company upon any lot or square, or upon any part of any lot or square, owned by the United States, or by any other body or bodies politic or corporate, or by any individual or individuals, within the limits of the city of Washington, for the purposes aforesaid, of locating or constructing the said road, or of excavating the same, or for the purpose of taking therefrom any material, or for any other purpose or uses whatsoever; but the said company, in passing into the district aforesaid, and constructing the said road within the same, shall enter the city of Washington at such place, and shall pass along such public

street or alley, to such point or terminus within the said city, as the said company shall find best calculated to promote the objects of said road: *Provided*, That the level of said road within the said city shall conform to the present graduation of the streets, unless the said corporation shall agree to a different level: *And provided also*, That the said company shall not be permitted to take or terminate the said road west of the west side of seventh street west: *And provided also*, That the said road shall not cross, or interfere with, or infringe on the existing Washington City Canal or the Chesapeake and Ohio Canal, their waters or basins, or any other canal which may hereafter be projected and executed to connect the said Chesapeake and Ohio Canal with the aforesaid Washington City Canal in its whole extent to the eastern branch of the Potomac: *Provided also*, The rate actually charged and received on all that part of said road within the district shall not exceed three cents a ton per mile for toll, and three cents a ton per mile for transportation, except as hereinafter specified, and shall be the same each way: *Provided also*, That the privileges granted by this bill to the aforesaid railroad company shall be upon the condition that the said company shall charge the same rate of toll upon the same articles going east and west between Baltimore and Washington.

SEC. 2. *And be it further enacted*, That in addition to the charges authorized by said act of incorporation to be made by the Baltimore and Ohio Railroad Company aforesaid, the said company shall be authorized, within the said district, to make any special contract with any corporation, company or individual, for the exclusive use of any car, or of any part of, or place in, any car, or other carriage, on any railroad constructed by the said company, for a specified time or distance, or both, or for the receipt and delivery, or the transportation of merchandise or other valuable articles, in boxes, parcels, or packages weighing less than one-tenth of a ton, on such terms as may be mutually agreed on between the parties: *Provided*, That the charge for the transportation of

merchandise or other valuable articles shall not exceed one cent per mile for any single box, parcel, or package weighing less than fifty pounds, and measuring in size not more than two cubic feet; and for any heavier or larger box, parcel, or package, weighing less than one-tenth of a ton, not more than two cents per mile. And the said company, in all cases where the whole of the merchandise, produce, or other property, transported on their railroad within the said district, at any one time, belonging to the same person, copartnership, or corporation, shall weigh less than a ton, and more than half a ton, shall be entitled to charge and receive, for the transportation thereof, at the same rate per mile as if it weighed a full ton; and if the same shall weigh less than half a ton, the charge per mile may be the same as for half a ton; always estimating a ton weight to be two thousand pounds.

SEC. 3. *And be it further enacted*, That the said company are, also, hereby empowered to make such special contract with any duly authorized officer or agent of the United States, for the conveyance of the mail, or the transportation of persons or property for the use of the United States, on any railroad which has been or shall be constructed by the said Baltimore and Ohio Railroad Company, on such terms as shall be approved of by the competent officer or authority; and in all such instances, to receive the compensation so agreed for according to the terms of each contract.

SEC. 4. *And be it further enacted*, That the said railroad company may charge and receive, for taking up and setting down any passenger or traveller within the district, conveyed a shorter distance than four miles, a sum not exceeding twelve and a half cents.

SEC. 5. *And be it further enacted*, That unless the said company shall commence the said lateral railroad within one year, and complete the same with, at least, one set of tracks, within four years from the passage of this act, then this act,

and all the rights and privileges thereby granted, shall cease and determine.

SEC. 6. *And be it further enacted*, That nothing herein contained shall be so construed as to prevent the Congress of the United States from granting the same or similar privileges to those hereby granted to any other company or companies, incorporated or to be incorporated by the state of Maryland or Virginia, or by Congress, or from authorizing, by any future law, such additional railroads or roads, in connection with said road, so as to extend the same road, or to construct others connected therewith, to such parts of the district as from time to time may be required by the convenience of those parts of the district into which the said company are now restrained from carrying said road, or from enacting such rules and regulations, prescribing the speed of cars or carriages passing over said road, and other matters relating thereto, necessary for the security of the persons and property of the inhabitants of the district, in such manner as to the present or any future Congress shall seem expedient: *And provided, nevertheless*, That nothing herein contained shall be construed to give any rights or privileges to the said company, beyond the limits of the District of Columbia.

SEC. 7. *And be it further enacted*, That if the state of Maryland shall determine to construct a railway between the city of Baltimore and the District of Columbia, or shall incorporate a company for the same purpose, then similar rights, privileges, immunities, and powers, conferred by this act on the Baltimore and Ohio Railroad, be, and the same are hereby, conferred on the state of Maryland, or any company which may be incorporated by it for the same purpose, within one year after the passage of this act.

Approved, March 2, 1831.

[4 Statutes, p. 672.]

Chap. XI.—*An Act further to continue in force "An act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio Railroad into and within the District of Columbia".*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the period limited and allowed to the Baltimore and Ohio Railroad Company, within which they are required by the fifth section of the act entitled "An act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio Railroad, into and within the District of Columbia," approved second March, one thousand eight hundred and thirty-one, to commence the road, and complete one set of tracks, be, and the same is hereby extended, and the said act shall remain in force, and all the rights and privileges thereby granted shall be vested in said company: *Provided,* They shall commence the said lateral road within one year, and complete the same, with one set of tracks, within four years from the passage of this act.

Approved, February 26, 1834.

[4 Statutes at Large, pp. 757–758.]

Chap. XXVIII.—*An Act supplementary to an act entitled "An act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio railroad into and within the District of Columbia," passed December, eighteen hundred and twenty-nine.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the Baltimore and Ohio Railroad Company be, and they are hereby, authorized to locate and construct their said road

within the city of Washington, through squares nine hundred and nine, eight hundred and eighty-eight, eight hundred and fifty-eight, eight hundred and thirty-two, nine hundred and eight, eight hundred and eighty-seven, eight hundred and fifty-six, eight hundred and fifty-seven, eight hundred and thirty-one, eight hundred and seven, seven hundred and seventy-six, seven hundred and fifty-one, seven hundred and eighteen, in the same manner, and with the same rights and privileges which are granted to them by the act to which this is a supplement, for the construction of their said road within the District of Columbia, beyond the limits of the city of Washington, anything in the said act contained to the contrary notwithstanding, and the assent of Congress is hereby given to the construction of the said railroad through or over any of the said lots or parts of lots which are owned by the United States.

SEC. 2. *And be it further enacted*, That the main stem of the said railroad, after passing through the squares or lots above-named, or any of them, shall not be constructed west or south of a point at the intersection of H street north, with Delaware Avenue until the route from that point to the final termination of the main stem of said road shall be surveyed and approved by the mayor, board of aldermen, and board of common council of the city of Washington; and when the said route shall be so surveyed and approved, the said company shall be, and they are hereby, authorized to construct the said railroad on the said route, under such restrictions and conditions as may be agreed upon by the said railroad company and the mayor, board of aldermen, and board of common council of the said city of Washington.

SEC. 3. *And be it further enacted*, That if the said route from the intersection of H street and Delaware Avenue should pass through any unimproved lots or squares except public reservations, the said railroad company shall be, and

they are hereby, authorized to construct their road through or over the same, upon the same terms, and with the same privileges, as are prescribed for passing through the squares enumerated in the first section of this act.

SEC. 4. *And be it further enacted*, That the said company are further authorized to construct branches of their road from the main stem thereof, within the said city, to such place or places, and in such number of tracts, (*sic*) as the corporate authority of the city of Washington shall assent to or permit: *Provided*, That the said branches shall not pass through any of the public reservations.

SEC. 5. *And be it further enacted*, That it shall be lawful for the said company, and they are hereby empowered to obtain, by gift or purchase, any lot or lots adjacent to any street or avenue along which the said company shall construct their said road or branches, and to hold and improve the same in such manner as may be necessary for the purposes of said company, or for the beneficial use of said road, or the branches thereof; and the said company shall be authorized to extend and construct tracks of railway into any lot or lots so held by them, in connection with the tracks in any adjacent street or avenue: *Provided*, That the free use of any street or avenue shall not be impaired thereby: *And provided, also*, That the said company shall not use or employ any steam engine in drawing or propelling the cars, wagons, or other vehicles, on any part of the said road within the city of Washington, except in such parts as may be agreed to by the corporate authorities of said city.

SEC. 6. *And be it further enacted*, That such provisions of the act to which this is a supplement, as are inconsistent herewith, be, and the same are hereby, repealed.

Approved, March 3, 1835.

[14 Statutes at Large, page 250.]

Chap. CCLI.—*An Act to authorize the Extension, Construction and Use by the Baltimore and Ohio Railroad Company of a Railroad from between Knoxville and the Monocacy Junction into and within the District of Columbia.*

WHEREAS it is represented to this present Congress that the Baltimore and Ohio Railroad Company, incorporated by the State of Maryland, are desirous of extending the road authorized to be built by them, by an act of the general assembly of that State, entitled "An act to authorize the Baltimore and Ohio Railroad Company to build a railroad from a point on the line of its road between Knoxville and the Monocacy Junction, through Frederick and Montgomery counties, to the boundary of the District of Columbia, so as to make a direct communication with the city of Washington," into and within the District of Columbia: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Baltimore and Ohio Railroad Company shall be, and they are hereby, authorized to extend into and within the District of Columbia the road aforesaid, to such point or points, terminus or termini, as may be agreed upon between the said company and the corporation of Washington, in respect of a road within the limits of Washington, and between the said company and the corporation of Georgetown, as respects a road within the limits of Georgetown. An[d] the said Baltimore and Ohio Railroad Company are hereby authorized to have and exercise the same powers, rights, and privileges, and shall be subject to the same restrictions, in the extension and construction of the said road, into and within the said District as they have, may exercise, or possess, or are subject to within the State of Maryland, under and by virtue of their charter or act of incorporation from the State of Maryland; and shall be entitled to the same franchises,

rights, compensation, benefits, and immunities in the use of the said road as are provided in the said charter.

SEC. 2. *And be it further enacted*, That all the provisions of the several acts of Congress relating to the lateral road authorized to be built into and within the District of Columbia by an act passed March second, eighteen hundred and thirty-one, and entitled "An act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio Road into and within the District of Columbia," and the supplements thereto, be, and they are hereby, declared to apply to the Baltimore and Ohio Railroad Company so far as they are severally applicable to the location, construction, and use by the said company of the road now authorized to be constructed into and within the said District.

SEC. 3. *And be it further enacted*, That the said railroad company shall commence the construction of said extension of said road within one year, and complete the same within three years after the passage of this act; and on failure to do so, the privileges granted by this act shall be forfeited by said company.

Approved, July 25, 1866.

Act of Assembly of Maryland of February 28, 1827.

(Session Laws of 1826-7, Chap. 123.)

The fifteenth section of the Act of Assembly of Maryland of February 28, 1827, incorporating the Baltimore and Ohio Railroad Company referred to in the first section of the Act of Congress approved March 2, 1831, (*Supra p. 3*) is as follows:

15. *And be it enacted*, That the president and directors of said company, or a majority of them, or any person or persons authorized by a majority of them, may agree with the owner or owners of any land, earth, timber, gravel, stone,

or other materials, or any improvements which may be wanted for the construction or repair of any of said roads, or of any of their works, for the purchase or use and occupation of the same, and if they can not agree, or if the owner or owners, or any of them, be a *feme covert*, under age, *non compos mentis*, or out of the county in which the property wanted may lie, when such land or materials shall be wanted, application may be made to any justice of the peace of such county who shall thereupon issue his warrant, under hand and seal, directed to the sheriff of said county, requiring him to summon a jury of twenty inhabitants of said county, not related nor in anywise interested, to meet on the land, or near to the other property or materials to be valued, on a day named in said warrant, not less than ten nor more than twenty days after the issuing of the same, and if at said time and place any of said jurors summoned do not attend, the said sheriff shall immediately summon as many jurors, as may be necessary with the jurors in attendance, to furnish a panel of twenty jurors in attendance, and from them each party or its, his, her, or their agent, if either be not present in person or by agent, the sheriff for him, her, it or them may strike off four jurors, and the remaining twelve shall act as the jury of inquest of damages; and before they act as such, the said sheriff shall administer to each of them on (*sic*) oath or affirmation, as the case may be, that he will justly and impartially value the damages which the owner or owners will sustain by the use or occupation of the same required by the company; and the jury in estimating such damages shall take into the estimate the benefit resulting to the said owner or owners from conducting such railroad through, along or near, to the property of said owner or owners, but only in extinguishment of the claim for damages; and the said jury shall reduce their inquisition to writing, and shall sign and seal the same, and it shall then be returned by said sheriff to the clerk or prothonotary of his county, as the case may be, and by such clerk or prothonotary, filed in his court, and

shall be confirmed by said court at its next session, if no sufficient cause to the contrary be shown; and when confirmed, shall be recorded by said clerk or prothonotary, at the expense of said company, but if set aside, the said court may direct another inquisition to be taken in the manner above prescribed; and such inquisition shall describe the property taken, or the bounds of the land condemned, and the quantity or duration of the interest in the same, valued for the company, and such valuation, when paid or tendered to the owner or owners of said property, or his, her, or their legal representatives, shall entitle the said company to the estate and interest in the same thus valued, as fully as if it had been conveyed by the owner or owners of the same; and the valuation, if not received when tendered, may at any time thereafter be received from the company, without costs, by the said owner or owners or his, her or their legal representative or representatives.

No. 359. 125
Off. of Hamilton & Colbert for Appellees.

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JAMES H. McKENNEY,
Clerk.

Filed Oct. 12, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 359.

FRANCIS WINSLOW *ET AL.*, TRUSTEES, *Appellants*,

vs.

THE BALTIMORE AND OHIO RAILROAD, *Appellee.*

GROUNDS OF OPPOSITION TO MOTION TO ADVANCE

GEORGE E. HAMILTON,
M. J. COLBERT,
Counsel for Appellee.

LAW REPORTER PRINT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

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FRANCIS WINSLOW *ET AL.*, TRUSTEES, *Appellants*,

vs.

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"Peculiar and unusual hardship, irremediable by reversal unless speedily had," is the ground upon which the motion for the advancement of this cause is based.

Rule 26 of the rules of practice of this court, once Rule 30, requires cases to be heard in the order in which they stand on the docket, and the ground upon which the appellant bases his request for a departure from this rule does not come within any of the exceptions to said rule.

The case at bar grows out of a controversy over the right of possession of four lots of ground, situated in the city of Washington, being lots numbered from nine (9) to twelve (12), both inclusive, in square numbered seven hundred and ten (710). The controversy is between the Baltimore and Ohio Railroad Company and the appellants, trustees and substituted trustees, under the will of Catherine Pearson, deceased, over the right of possession of certain lots belonging to the estate of said Catherine Pearson, and which have been in the possession of said company since 1872, it having used the same continuously as a part of the right of way and tracks of its Metropolitan branch, duly

authorized by act of Congress to enter into the District of Columbia, the said possession being under several leases dated respectively August 1, 1872, February 1, 1883, January 30, 1888, and October 17, 1892, each of said leases being for the term of five years, respectively—

> "or until such time as the said parties of the first part shall be prepared to convey the said premises, as hereinbefore agreed, with a perfect title in fee simple thereto,"

and all of them containing a provision for renewal for another term of five years. The first lease of August 1, 1872, which is set forth in full (Rec., pp. 7–8), gives the exact provisions contained in all of the subsequent leases referred to and the rent for said terms, to the amount named in the several leases, has been regularly paid by the company to the said trustees, and by said trustees paid over to, and accepted by the life tenant, Mrs. Eliza W. Patterson, who, under the will of said Catherine Pearson, was entitled to the income from said property, and who was in constant correspondence with the company as to the payment of rents, as will appear from her letters (Rec., pp. 60–64). In these letters Mrs. Patterson refers specifically to the property as being her property leased to the company, and as being occupied by the Metropolitan branch of that road (see Exhibit No. 24, Rec. p. 61). Even after the controversy arose between the parties the rents were paid without prejudice to the claims of either party until some time in 1900 (Rec., pp. 11–12).

The cause, therefore, is one in which private interests only are concerned, certainly so far as the rights of the appellants are concerned. The only possible interest of a public nature would be in the line of maintaining the present status and preserving to the company the possession of lots now used for the tracks and right of way of the Metropolitan branch, but this view of the case would operate against the present request of the appellants, and besides does not con-

stitute such a public question as would come under the exception to Rule 26, above referred to.

Passing upon a similar application in United States *vs.* Fossatt, 21 Howard, 445, the court says:

> "No case can be taken up out of its order on the docket, where private interests only are concerned. The only cases where this rule does not apply are those in which the question in dispute will embarrass the Government while it remains unsettled."

Again, in Sage and Others *vs.* The Central Railroad Company of Iowa and Others, 93 U. S. 412, the court says:

> "A cause involving private interests only, will not be advanced for a hearing in preference to other suits on the docket."

In Carter *vs.* Greenhow, 109 U. S. 64, the court has held that—

> "a case will not be taken up out of its order simply because it is of great public importance."

And in Baltimore & Ohio Railroad Company *vs.* Marshal County Supervisors, 131 U. S., Appendix XCIX, in passing upon a motion to advance based upon the ground that very important interests of the State of West Virginia were involved in the litigation, the court held that the cause—

> "does not come within any of the exceptions to the 30th rule (now rule 26) which requires that all cases shall be heard when reached in the regular call of the docket, and in the order in which they are entered. We are obliged, therefore, to deny the motion."

Other decisions where the court upon applications to advance has made similar rulings are to be found, but as they are all in the line of the cases above cited, it is deemed unnecessary to enumerate them.

But even if the ground alleged in this case for advancement was within the rule of this court, an examination of the Record would show that no unusual hardship would or could come to the appellants by waiting the regular call of this case in the order in which it stands upon the docket.

On March 9, 1900, the trustees under the will of Catherine Pearson began suit against the complainant, the Baltimore and Ohio Railroad Company, before a justice of the peace, in the city of Washington. Without trial judgment was entered for the plaintiff, and the cause appealed to the Supreme Court of the District of Columbia, and docketed as suit At Law No. 43,895. Subsequently the trustees brought another suit for the use and occupation of said lots, claiming the sum of $6,500, with interest from the 16th day of April, 1900. On the 4th day of October, 1900, the Baltimore and Ohio Railroad Company filed its bill in these proceedings (Rec., pp. 1–7); this bill was for specific performance and to restrain the proceedings at law above referred to. A temporary restraining order, pending the suit, was allowed, and upon final hearing in the court of equity, the bill was dismissed (Rec., p. 72), an appeal was taken to the Court of Appeals, and the decree of the court of equity was reversed (Rec., pp. 74–83), whereupon the appeal from the Court of Appeals was taken to this court. The Court of Appeals decided that the lease executed by Winslow, trustee, in 1892, and delivered to the company, and acted under by both parties, the rent having been regularly paid to Mrs. Patterson throughout the term created, was a valid lease, said Winslow acting as the agent of the trustees, and being in effect the sole trustee in the active management of the trust (Rec., pp. 79–80). It held further that in view of the use of the property for its right of way, which use was not only authorized by the trustees, but sanctioned throughout for over twenty-five years, by said trustees, and by Mrs. Patterson, the life

tenant, it became so entitled to the property, as not to be liable to trustees for dispossession or any other similar proceedings, but could only be compelled to pay the value of the land. The possession of the property by a railroad, under the circumstances disclosed by the record, was such as to give the public an interest in the continuance of that possession, an interest which the courts would protect.

Without discussing the merits of the case as presented by the record, and without regard to whether the opinion of the Court of Appeals is right or wrong, it certainly appears not only that the rent has been paid by the company to the trustees for the land in question, and according to the terms of the several leases up to January, 1900 (Rec., pp. 11–12), but that the trustees obtained judgment for possession of said property before a justice of the peace, and that this judgment was appealed from by the Railroad Company, which under the provisions of law *was compelled at the time to, and did, give a bond covering intervening rent, damages and costs, and this proceeding is still pending before the Supreme Court of the District of Columbia on said appeal.* That if at any time the judgment of the Court of Appeals should be reversed by this court, the restraining order or effect of said decision upon said suit at law referred to, would be removed, and in the event of a termination of said suit at law in favor of the appellant's trustees, they would be fully protected in the matter of rent, damages and costs. Furthermore suit At Law No. 44,116 (Rec., p. 6) for use and occupation, would under the effects of a reversal by this court, be in a position for trial, in order to determine whether or not anything more had to be paid by the company over and above the rent named in said leases.

Again, the property is occupied by the tracks of the defendant company, and not by any building which could be injured, destroyed, or which could suffer even deterioration. It would thus seem from a consideration of the Record in

its entirety and fullness that the claim upon which the motion to advance is based is without a shadow of foundation in fact. Without regard to the company at all the bond in the suit at law referred to gives all needed protection to the appellants.

It is respectfully submitted that under the rule of this court, and under its uniform practice, as expressed in the cases cited, the motion for advancement of this cause should be overruled.

GEORGE E. HAMILTON,
M. J. COLBERT,
Counsel for Appellee.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 125.

FRANCIS WINSLOW ET AL., APPELLANTS,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

BRIEF ON BEHALF OF APPELLEE.

G. E. HAMILTON,
M. J. COLBERT,
Counsel for Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

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THE BALTIMORE AND OHIO RAILROAD COMPANY.

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I.

STATEMENT OF THE CASE.

This is an appeal from the Court of Appeals of the District of Columbia, reversing the decree of the Special Term of the Supreme Court of the District, and remanding the cause to that court with directions to restore the injunction prayed for in the bill, and to make the same perpetual.

The bill was filed by the Baltimore and Ohio Railroad Company against the trustees of the estate of Catharine Pearson, deceased, to enjoin the prosecution of certain suits at law brought by said trustees against the Railroad Company, one of said suits being a landlord and tenant proceeding to oust the Railroad Company from the possession of the property in controversy, and the other to recover the value of the use and occupation of said land by the Railroad Company from and after August 1, 1897, at which

time the appellant's claim that the rightful possession of said land by the Railroad Company ceased. The prayers of the bill were for a specific performance of a contract of sale, claimed to be existing between the parties, for the execution of a formal lease for five years from 1897, and for an injunction against the prosecution of the two suits at law above referred to.

By act of Congress of July 25, 1866 (14 Stat. p. 250), the Baltimore and Ohio Railroad Company was authorized to extend to and within the District of Columbia its Metropolitan branch, and in 1872, when the work of constructing said branch was under way, the line of said branch, as projected, ran through the corner of square numbered seven hundred and ten (710), in the city of Washington, D. C., and it became useful for the company to acquire for the purposes of a right of way, lots 9, 10, 11 and 12, in said square. It appears (Rec. p. 11, Complainant's Exhibit No. 5) that negotiations for the purchase of said lots were entered upon by the Railroad Company and the trustees of the Pearson estate, but by reason of some defect in the title a conveyance of the land could not be made, and as the immediate use of the property was necessary, a lease was made, but in such form as would compel the transfer of the lots at the price agreed upon whenever title could be given, the rent reserved in the lease representing 6 per cent interest upon the purchase price, which was $12,592, or at the rate of 30 cents per foot for these lots, which contain 41,975 square feet of ground.

The property in controversy was part of the estate of Catharine Pearson, deceased, and by the terms of her will (Rec. p. 26) she devised all the rest and residue of her estate (including the property in controversy) to Patterson, Philip and Cox, trustees, in trust for the sole and separate use of her daughter, Eliza Patterson, for life, and to permit her, by herself, or her attorney, appointed in writing, to be signed by her, to receive the annual income, her receipt, or

that of her attorney, to be an acquittance to any person charged with the payment of such income, and, if she pleased, to occupy and use the property for her own account, and—

> "if at any time the said Eliza Patterson shall, in writing to be signed by her in the presence of and to be attested by a subscribing witness, desire, the said trustees to sell any part of the estate held by them for her separate use, for the purpose of changing the investment thereof, it shall be lawful for the said trustees to sell the same for such purpose only."

A sale of the property being impracticable in 1872, a lease bearing date August 1, 1872, was executed by the trustees, but not signed by the life-tenant, leasing the land in controversy to the Railroad Company for five years at the annual rent of $755.55 and containing the provision that the trustees should convey the fee at any time during the term of the lease to the Railroad Company upon the payment of $12,592. The lease contained the further provision that at the request of the company, the trustees would renew the lease with all its privileges for another term of five years or until the trustees should be prepared to convey a good title, and in the event that the company should omit to make a request for a renewal of the lease, the trustees were required to notify the company of the expiration of the term demised and require it to exercise its option of renewal, the privilege of renewal to continue for three months after such notice.

This lease was not signed by Mrs. Patterson, the life tenant, but rent was regularly paid until 1883, at which time (on February 1) a new lease was executed by the trustees and signed by Mrs. Patterson as well, similar in all respects to the lease first mentioned, and giving the company the right to a further renewal of five years.

On October 17, 1892, a similar lease from Cox, Winslow,

and Jay, trustees, was prepared, but was actually executed by Winslow only, Judge Cox at that time having resigned as trustee, and Mr. Jay, the other trustee, being absent in Europe. This lease was not signed by Mrs. Patterson, but she continued to receive rents thereunder, and between 1892 and 1897 she wrote the several letters appearing on pages 62, 63, and 64 of the Record, calling upon the company to pay the semi-annual rent. In one of these letters (Rec. p. 63) she directs the rent to be sent to Mr. Winslow, trustee of her mother's estate, and in another of the letters (Rec. p. 64) she refers to "the interest upon the money due me by the Baltimore and Ohio Railroad Company for the use of my property."

This was the condition of affairs at the time of the expiration of this lease, in August, 1897.

On August 4, 1897, the company notified Winslow, Jay, and Cox (Rec. p. 11) of its desire to renew the lease. This letter was forwarded to Judge Cox, who replied under date of August 18, 1897, to the effect that he was no longer trustee, and that Mr. Winslow was attending to Mrs. Patterson's affairs, as Mr. Jay was in Europe.

On August 10, 1897, the company again notified the trustees of its desire to renew the lease, and this letter was forwarded to Mr. Winslow (Rec. pp. 36, 50). Under date of September 27, Mr. Winslow replied:

> "We are now prepared to convey the property with a perfect title, and prefer executing such conveyance to renewal of the lease."

This formal notice was referred to in another letter dated September 27, 1897, addressed to the company's counsel (Rec. p. 11), in which Mr. Winslow states in substance that the renewal of the lease had always been made because of the fact that the trustees were not in a position to convey title, and he adds: "I suggest, as we are now able to furnish a satisfactory title, the present as a suitable time to transfer the property."

A copy of the proposed new lease was at this time sent to Mr. Winslow. The rent from August 1, 1897, to February 1, 1898, became due, and a voucher therefor payable to Mr. Winslow was sent to Thomas J. Fisher & Co., the general agents of the estate. In view of Mr. Winslow's absence in Nicaragua, the voucher was sent to Mrs. Patterson, who, under the terms of her mother's will, was entitled to receive the rent directly. Mrs. Patterson returned the voucher to the company (Rec. p. 11), suggesting that she could not have it cashed without Mr. Winslow's signature, and asking that the voucher be made payable to herself or to Judge Cox and the other trustees, as had been done for many years, in order that she might get the money thereon. The company declined to do this, but upon an arrangement between Mrs. Patterson, Thomas J. Fisher & Co., the voucher above referred to was indorsed "Francis Winslow, by Thomas J. Fisher & Co., attorneys," and on such indorsement, the money was paid to Mrs. Patterson. This check was made out for the same amount as had always previously been paid, and was a distinct recognition on Mrs. Patterson's part of the renewal of the lease. When the next instalment of interest became due in August, 1898, Mr. Winslow declined to negotiate the voucher for the rent, claiming that the rights of the company had been terminated by his notice of September, 1897, and that the company was then occupying the property as tenants at sufferance. The rent for the prior six months was not, however, returned by Mr. Winslow, and the company disputed the contention of Winslow and insisted upon its rights as lessee, claiming that the notice of September 27, 1897, given by Winslow, was not in sufficient form, and contained no definite refusal to renew the lease, but simply asserted a readiness to convey and a preference to sell rather than to lease; that the succeeding vouchers for rent, forwarded to Mr. Winslow and made payable to his order, were retained until January 5, 1900, when they were returned to the company, and a check given for the

aggregate amount thereof under the agreement that the payment of this amount and its acceptance should be without prejudice to the rights of the parties, respectively, and this agreement appears in the Record.

Under this agreement negotiations were conducted for the settlement of the differences between the parties, but without success, and the company's position is fully set forth in a letter dated February 18, 1899, from J. D. McCubbin to Francis Winslow, trustee, and appearing on page 12 of the Record.

On January 23, 1900, the offer of the trustee, made through Messrs. Carlisle & Johnson, to rent the lot referred to at $1,500 per year, was declined in a communication to be found on page 13 of the Record.

On March 19, 1900, the trustee under the will of Catherine Pearson begun suit against the complainants, the Baltimore and Ohio Railroad Company, before Lewis I. O'Neal, Justice of the Peace, for the possession of the lot referred to. In that court, without trial, judgment was entered for the plaintiff and the case appealed to the Supreme Court of the District of Columbia and docketed as suit at law No. 43,895.

On August 15, 1900, the trustee again brought suit against the Railroad Company in the Supreme Court of the District of Columbia, at Law No. 44,106, for the use and occupancy of said lots in controversy, claiming $6,500, with interest from the 16th day of April, 1900.

On the 4th day of October, 1900, the Baltimore and Ohio Railroad Company, the appellee here, filed its bill in the present case, whereupon the defendants were restrained as prayed in the bill (Rec. pp. 13 and 14)

On October 15 the defendants' answer was filed, and thereupon the restraining order referred to was continued until the final hearing of the case. Testimony was taken, and on the 25th day of February, 1901, at the final hearing before Justice Barnard, holding the Equity Term of the

Supreme Court of the District of Columbia, the bill was dismissed.

Upon appeal to the Court of Appeals of the District of Columbia, the judgment of the lower court was reversed, and the opinion of that court will be found on page 74 of the Record, the opinion of Justice Barnard, of the Supreme Court, appearing on page 70 of the Record.

II.

ARGUMENT.

The appellants in this court assign as error:

(1) That the Court of Appeals erred in holding that the Railroad Company was entitled to a renewal of the lease after July 31, 1897; and

(2) That the court erred in holding that the lease of October 17, 1892, signed by Francis Winslow alone, conferred any right upon the complainant; and

(3) That the court erred in holding that the complainant was at any time vested with the power of condemnation of the land described under the right of eminent domain; and

(4) That the court erred in not affirming the decree of the Supreme Court in dismissing the bill; and

(5) That the court erred in enjoining the appellants from prosecuting their actions at law; and the appellee here takes up these various assignments of error in their order.

III.

By the terms of the lease of 1892 it was provided that at the request of the lessee the lessors should renew the lease

for five years additional, *or until the lessors should be prepared* to convey a good title in fee, and in case the lessee should omit to make said request *at or before* the expiration of said term, the lessors were required to notify the lessee of the expiration of the lease, *and require it to exercise its election to renew the lease.* The lease of 1892 did expire and there was no request for a renewal at or before its expiration. Did the trustees require the Railroad Company to exercise its election? Most certainly they did not. In his letter to Mr. Colbert Mr. Winslow states—

> "the renewal of the lease has always been under the same reciprocal conditions and obligations, and I do not feel authorized to change them, but *I suggest*, as we are now able to furnish a satisfactory title, the present as a suitable time to transfer the property."

Under the provisions of the lease of 1892, the Railroad Company had the absolute right of renewal for a further term of five years from and after August 1, unless the trustees refused to renew the lease and accompanied their refusal by a tender on their part of a conveyance of a good title in fee simple thereto.

Mr. Winslow made no such tender. It is not pretended that Mr. Jay was in a position to execute a conveyance or that he was even in this country. There is no showing made that a deed was even prepared and ready for execution or that the formalities required by the will of Mrs. Pearson had been complied with. Until this was done, certainly the Railroad Company had the absolute right to the renewal until such time as the trustees were in position to tender a deed. It is not pretended that there is any showing in this record that the trustees were even in a position to tender a deed other than the naked statement of Winslow that the present was a suitable time to make the transfer.

IV.

The Lease of 1892 Executed by Winslow Alone was Sufficient to Entitle the Lessee to a Further Renewal in 1897.

In his letter of September 27, 1897, Winslow explicitly states that the renewal of the lease (including, of course, the lease of 1892) has been under the same reciprocal conditions and obligations. Until 1892 the leases were signed by all the trustees. The lease of 1892 was signed by Winslow only. Assuming that the lease of 1892, executed by Winslow alone, and acted upon by Mrs. Patterson and ratified by her, constituted a valid and binding contract, we contend that under the terms of the instrument the Railroad Company was entitled to a renewal of the lease for five years from August 1, 1897, and if that be so, clearly the suits at law could not have been maintained and should have been enjoined.

Mrs. Pearson's will (Rec. p. 27) devised the property in controversy to her trustees in trust for Mrs. Patterson for life, with power in the life tenant to receive the rents and income therefrom and if she so desired to use and occupy the property herself. The trustees are given no active control over the property during the lifetime of Mrs. Patterson, who had the right to receive all the income therefrom, or if she so preferred, to use it herself, but before Mrs. Patterson could receive these rents she must first have received permission from the trustees so to do. The lease of 1892, signed by Winslow alone, was acquiesced in by Jay, the only other trustee at that time existing. No complaint was ever made by him that Winslow had exceeded his authority, and it must be presumed that in executing the lease which purported to be from all the trustees, that he was acting for all the trustees by their authority,

and certainly he was acting by the authority of Mrs. Patterson, who for five years recognized the validity of the lease and received all the benefits to which she was entitled thereunder. If we assume, therefore, that this lease of 1892 was valid and binding, then, on August 1, 1897, the Railroad Company was entitled to a renewal for a further term of five years. Why were they not so entitled? Mrs. Patterson, the life tenant, recognized the right to a renewal by demanding and receiving six months' rent after August 1, 1897, because Judge Cox, one of the trustees, had resigned and the only other trustee was absent from the United States. The rents were regularly paid to the life tenant, the party entitled to possession from 1892 to 1897 and after August 1, 1897. As late as February, 1898, Mrs. Patterson states that the draft sent her on January 28, 1898, to the order of Winslow, could not be cashed because he was in the country, but that Mr. Cox and Mr. Jay were both in Washington and they would indorse it, although, as a matter of fact, Judge Cox had long before ceased to be trustee. This statement on the part of the life tenant, however, clearly indicated that all the trustees were familiar with the existence of the lease of 1892 and ratified its execution by their long-continued silence, if not by their express ratification.

Winslow was clearly the agent of the other trustees and of Mrs. Patterson herself in the execution of the lease of 1892, and his act bound them all.

See—

Tiffany and Bullard on the Law of Trusts and Trustees, p. 539 et seq.
Ex parte Rigby, 19 Ves., p. 463.
Sinclair *vs.* Jackson, 8 Cowen, 543.
Bowers *vs.* Seegers, 8 W. S. 222.
Abbot *vs.* The Rubber Co., 33 Barb. 579.
Leggett *vs.* Hunter, 19 N. Y. Rep. (5 Smith), 445.
Messeena *vs.* Carr, 9 L. R. Eq. 260.

In Messeena *vs.* Carr, *supra*, the court said:

> "I had some doubts at first whether the discretion was to be exercised by the two trustees, and only one had acted, the discretion had been properly exercised, but I have come to the conclusion that as the other trustee approved and sanctioned what was done by the one who made the payments, no breach of trust was committed."

And actions unauthorized when performed by a single trustee in respect to the trust estate, may be subsequently ratified and validated either in writing or *in pais* by his co-trustee.

> Insurance Company *vs.* Chase, 5 Wallace, 512.
> Blanchard *vs.* Waite, 28 Maine, 39.
> Messeena *vs.* Carr, *supra.*

In Insurance Company *vs.* Chase the Supreme Court says:

> "But it is argued that the legal title to the Congregational Church was vested in five trustees, and that to give validity to their acts they must act jointly in whatever they do for the benefit of the property. It is true that in the administration of the trust, where there is more than one trustee, all must concur, but the entire body can direct one of their number to transact business which it may be inconvenient for the others to perform, and the acts of the one thus authorized are the acts of all and binding upon all. The trustee thus acting is to be considered the agent of all the trustees and not as an individual trustee. If within the scope of his agency, he procures an insurance, it is for the other trustees as well as himself. If he does it without authority, still it is a valid contract, which the underwriter can not disdispute, if his co-trustees subsequently ratify it."

The lease of 1892 was executed with the full knowledge of Mrs. Patterson, who not only received all the rents under it, but on numerous occasions wrote to the lessees recognizing the existence of the lease and asking for payments

under it. If Mr. Jay attempted to perform any of his duties as trustee he must have known of the existence of the lease, and if he did not actually know of its existence he must have committed the management of this business to his co-trustee, Mr. Winslow, and must be held to have ratified his action in signing the lease of 1892. But there is another view of this matter to be taken. Mrs. Patterson clearly authorized and ratified and acted under the lease of 1892. She alone was entitled to receive the rents from this property and to use it herself if she so desired. The trustees, with respect to the mere right of leasing, had no active duties to perform, certainly while Mrs. Patterson lived, and her ratification of Winslow's act was as effectual to validate the lease, if it required validation, as if she had signed the lease itself or had authorized any other agent so to do. If then this lease signed by one trustee and ratified by the other and by the beneficiary was valid, then the Railroad Company was entitled to a further renewal of the lease in 1897. When the time came for that renewal, and when a renewal was requested, Winslow did not refuse to renew, but said he would *prefer* executing a conveyance to renewing the lease. He did not exhibit the written request of Mrs. Patterson to sell. He did not even state that she had consented. He did not return the six months' rent paid after August 1, 1897, and which had been collected by the life tenant.

The authorities cited by the appellants upon pages 15a, 15b, 15c, 15d, 15e, and 15f, are all to the point that the force and effect of the lease of 1888 were limited to a term of five years from August 1, 1887, and a single renewal thereof for five years additional, or until July 31, 1897. Even if the appellee were to admit the correctness of this position it does not touch the force and effect of the lease of 1892 signed by Winslow alone. While it is true as a general proposition that where property is vested in more than one trustee having active duties to perform, any instrument dealing with the property must be executed by all the trus-

tees, in this particular instance Mrs. Patterson had absolute control of the property in dispute so long as she lived and could have executed a valid lease binding upon her life estate without the signature of any of the trustees. Moreover, in this particular instance one of the trustees did sign the lease and on August 21, 1893, as appears by page 63 of the Record, nearly a year after the execution by him of the lease of 1892, directed the real estate agent of the Railroad Company to pay rent under the lease, and as appears from page 67 of the Record, on October 15, 1892, Mr. Winslow executed the lease of 1892 and forwarded it in duplicate to Thomas J. Fisher & Co., its general agents.

No pretense is made in this letter that Mr. Jay's signature was necessary to make the lease a completed instrument. On the contrary, on October 17, 1893, Mr. Winslow was advised by his agents that the lease executed by him had been forwarded to the Railroad Company, and on the same date the lease was forwarded to the Railroad Company by Mr. Winslow's agents, and a day later the same agents notified the Railroad Company that Judge Cox has resigned as trustee and that Mr. Jay was in Paris, and from that time to the present moment nobody has ever pretended that Mr. Jay repudiated the act of his cotrustees in executing the lease in question and in delivering it as a completed instrument.

We submit that there is no force and no merit in the contention that the act of Mr. Winslow in signing the lease of 1892 was accidental or negligent. On the contrary, he states himself, as will appear from page 11 of the Record, that the lease was renewed from time to time and was always renewed on the understanding that the Railroad Company had the right to buy the property ultimately whenever the trustees were in a position to make a valid conveyance. It would seem that the suggestion now made for the first time that in executing the lease of 1892 Mr. Winslow desired merely to put into written form the covenant of renewal for

a single term of five years contained in the lease of 1888, is a mere subterfuge and is contradicted by every document and every letter signed by him and which appears in this record.

V.

Since the preparation of the body of our brief, and when a hearing of the cause was imminent, we received a copy of the brief for the appellants, and while time will not permit us to make a full reply, we wish to call the attention of the court particularly to the third assignment of error, and to the argument in support thereof.

The object of this suit was to protect the Railroad Company in its right to occupy vacant lots with the tracks of its Metropolitan branch, which occupation was threatened by certain suits at law brought by the appellants, to recover this property, which the appellee claimed it had the right to occupy by reason of a provision for the sale and purchase of the same, and the right of renewals contained in a series of leases from 1872 to 1897. To establish this right of possession the appellee sought primarily to restrain these suits, and to enforce its rights under the contracts referred to.

It appears from the pleadings (paragraph 3 of the bill) that the property was first acquired, and has since been held, by the defendant in error for the construction of its Metropolitan branch, and the use of the property by the defendant in error is referred to in a letter from Francis Winslow, one of the trustees (Rec. p. 11), and by Mrs. Carlisle P. Patterson, the beneficiary under the will of Catharine Pearson (Rec. p. 60). These considerations did, we submit, constitute in the pleadings and proof sufficient matters of fact to authorize the Court of Appeals to consider the power of the appellee to exercise the right of eminent domain with regard to its protection in the occupany of said lots, especially when by doing so the court could avoid the unnecessary exercise of its discretion in decreeing speci-

fic performance, as prayed for in the bill. It is further submitted in this regard that this and similar questions raised by the record, do not stand upon the basis of a controversy between two private individuals. The occupation of this land by the appellee with its Metropolitan branch is not a question between the parties to this suit only, but it is a question in which the public has even a larger interest than either of the parties.

This road is a common carrier of passengers, leading to and built within the limits of the National Capital; it is a carrier of United States mail, and as was stated in the case of Joy *vs.* St. Louis, 138 U. S., page 47—

> "*Considerations of the interests of the public are held to be controlling upon a court of equity, when a public means of transportation, such as a railroad, comes into the possession and under the dominion of the court. These considerations have been recognized and applied by this court in several cases.*"

And again on page 50:

> "*Railroads are common carriers and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation.*"

The power of the appellee to exercise the right of eminent domain, both upon its Washington branch and its Metropolitan branch and within the District of Columbia, has, without question, been frequently exercised, and we submit is conferred fully by the several acts relating to this company.

The act of 1831 does contain the provision cited on page 30 of the appellant's brief, which would seem to limit the

right of condemnation to the District outside of the city limits, and within the District to specified streets and alleys; but it was found necessary to depart from this limitation, and supplemental acts were from time to time passed, and in the act of 1835, 4th Statutes, 757, the defendant in error is permitted to construct its line in the city through certain enumerated squares—

> "*in the same manner and with the same rights and privileges, which are granted to it by the act to which this is a supplement, within the District of Columbia, beyond the limits of the city of Washington,*"—

and beyond the city of Washington it had the right to condemn. In the third section of this same act it is provided that if the route should pass through any unimproved lots or squares, except public reservations, it might construct the same upon the same terms and with the same privileges as are prescribed for passing through squares enumerated in the first section of this act. And immediately afterwards, in section 4, the appellee is authorized to construct branch roads over the main stem within the city of Washington, to such place or places as the corporate authority of the city of Washington should assent to, or permit, and the only limitation is that such branch roads should not pass through public reservations.

Thus it would appear that Congress, which, in the beginning, was unwilling to give to the appellee (the first railroad company to build a railroad to and within the National Capital) the right to exercise the power of eminent domain within the city limits, soon found it useful, and even necessary, to depart from this rule, and from time to time extended the power of this company, until, as above stated, it practically did away with its restrictions, and provided that it might exercise this right, not only in certain enumerated squares, but in other squares, if such other squares were needed to complete its line, and even authorized it to build branch roads within the District, which

could only be done, as it had been found in the construction of the original line into Washington, by the condemnation of private property in proper cases.

When, therefore, Congress was, on July 25, 1866, called upon to—

> "authorize the extension, construction and use by the Baltimore and Ohio Railroad Company of a railroad from between Knoxville and Monocacy Junction into and within the District of Columbia"—

which is known as the Metropolitan branch, it authorized the appellee to extend into and within the District of Columbia the road aforesaid—

> "to such point or points, terminus or termini, as may be agreed upon between the said company and the corporation of Washington"—

and gave to it the same rights and privileges as it possessed or was subject to within the State of Maryland, under and by virtue of its charter or act of incorporation from said State, and gave to it also the same franchises, rights, compensations and benefits, as was provided in said charter. It made also, as far as were applicable, all the provisions of the several acts of Congress relating to the construction and use of the lateral branch of the Baltimore and Ohio Railroad within the District of Columbia, and the supplements thereto. When it is considered that in this last named act, the line within the city was not confined to streets and alleys, that even its terminus within the city was not limited, and that it was clearly intended by Congress to give to the appellee, in the construction of this, its Metropolitan branch, all of the rights, benefits and privileges conferred upon it by the several acts of congress and by its charter from the legislature of Maryland, which charter gives very fully the power to exercise the right of eminent domain, it can not, we think, be seriously contended that the appellee is without the power

to exercise the right of condemnation within the District of Columbia. All of the acts of Congress referred to, as well as the charter from the legislature of Maryland, and all of the provisions of these several acts, will be taken and considered with reference to the subject-matter contemplated, and the ends to be accomplished by the corporation for the purpose of determining the intention of Congress in regard to the exercise of the right of eminent domain. This is a recognized principle of construction. It has been held that—

> "*courts will give the charter such a construction as is necessary to effectuate all the powers, privileges and immunities conferred by it, and is necessary to carry into full effect its purposes and objects. It is upon this principle that it is held that a charter authorizing the construction of a railroad from one point to another, carries with it authority to take lands necessary for that purpose, although such authority is not expressly given.*"
>
> Wood on Railroads (2d Edition), Vol. 1, p. 14, and cases cited.

It will be borne in mind that in the act of July 25, 1866, authorizing the construction of the Metropolitan branch of the Baltimore and Ohio Railroad, Congress does not fix its terminus in the city of Washington, and does not, as in the old charter, attempt to confine its lines to streets, or to confine its location or lines in any degree; so that even if there is no express grant of the power to exercise the right of eminent domain, it is clearly and completely implied, not only from the intention of Congress as indicated in the several acts referred to, but from the authority given the appellee to build this branch road without restriction as to location and route. This contention is supported by all of the text-writers, and their position sustained by authorities cited. Thus, in Beach on Private Corporations, Vol. 2, page 654, it is stated that—

> "*although the power of eminent domain may not have been expressly delegated to a corporation, yet if the enter-*

prise which it is organized to conduct appears, from its charter and the circumstances of the case to be of a public nature, the power is deemed to have been granted by implication."

VI.

It is contended next that the decree of the trial court dismissing the bill should have been affirmed, because the sole object and aim of the bill was to enforce an alleged contract of sale, and that the record shows no contract that was enforcible.

We submit that this is a misapprehension of the scope and object of the bill. The bill was filed primarily for the purpose of enjoining the defendants from interfering with the possession by the complainant of the property in dispute. It was primarily a suit for injunction, and in addition to that the bill prayed that the defendants might be required to execute a formal instrument of lease for five years, from August 1, 1897, and if for any reason shown in the bill, the complainant was entitled to have the suits at law enjoined, the bill should have been sustained. If the complainant was entitled to have the lease of 1892 renewed, then the injunction should have been allowed, and to that extent at least, the decree of the trial court dismissing the bill was erroneous and the Court of Appeals properly reversed that decree. But we contend that the contract of sale in this case was enforcible. A court of equity in most instances will regard the doctrine of specific performance as a matter of discretion to be governed by the particular circumstances of each case, and in this instance it is peculiarly appropriate that the discretion should have been exercised in favor of the complainant. As far back as 1872, the Railroad Company was in negotiation for the purchase of this property, but could not buy because of a defect in the title. The whole object and purpose of the various leases and renewals thereof was to enable the Railroad Company to

purchase this vacant ground for the purpose of its right of way. This purpose was manifested time and time again by the trustees and by the life tenant in every possible way. Mrs. Patterson recognized in writing over her own signature the existence of the contract, and she is now estopped from denying the authority of the trustees to make a binding contract for the sale of the property under the terms of Mrs. Pearson's will. These contentions and restrictions were intended for her benefit and protection and she had the power to waive them.

The other assignments of error relied upon by the appellants have been considered as fully as has been possible in the short time that the appellant's brief has been before us, and we therefore respectfully submit that the decree of the Court of Appeals should be affirmed.

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Supreme Court of the United States.

No. 125.—October Term, 1902.

Francis Winslow et al., Appellants, vs. The Baltimore and Ohio Railroad Company. } Appeal from the Court of Appeals of the District of Columbia.

[February 23, 1903.]

The Court of Appeals of the District of Columbia, reversing the judgment of the Supreme Court of the District, (which dismissed the bill of the railroad company,) directed that court to give judgment in favor of the company, and from the judgment of the Court of Appeals an appeal to this court has been taken by the defendants below.

The company brought this suit to obtain a judgment declaring the validity of an alleged lease to it for five years from the first day of August, 1897, and to compel the specific performance of an alleged contract to sell to it the same land mentioned in the lease and lying in the city of Washington, owned by the defendants as substituted trustees under the will of the late Catherine Pearson, deceased, and to enjoin the defendants from continuing proceedings at law which they had commenced to obtain possession of the premises, and also to enjoin them from the prosecution of an action to recover damages for the use and occupation of the land by the railroad company. The facts are as follows:

Catherine Pearson in her lifetime owned certain land, consisting of unimproved lots in the city of Washington, near the Baltimore and Ohio Railroad Company's depot, and lying on the line of its Metropolitan branch as subsequently constructed in that city. After the decease of Mrs. Pearson, and on June 30, 1868, her will was duly proved before the proper probate court in the District. In it she devised the premises to trustees for the sole and separate use of her daughter, Eliza W. Patterson—

"During the term of her natural life, and so that the same shall not be liable for the debts or subject to the control, contracts or engagements of her present or any after-taken husband; to permit her by herself, or her special attorney appointed in writing, to be signed by her, to receive the annual income and profits of the same for her own sole and separate use, her receipt or that of her attorney so appointed as aforesaid alone to be an acquittance to the person or persons charged with the payment of such income or any part of the same, and to the extent only therein expressed to have been paid—and if she please to occupy, possess and use for her own account, accommodation and convenience and that of her family any part of the property, real and personal, so held for her separate use and

benefit, she shall be allowed to do so; and if at any time the said Eliza Patterson shall in writing, to be signed by her in the presence of and to be attested by a subscribing witness, desire the said Carlisle P. Patterson, William H. Philip and Walter S. Cox, or the survivors and survivor of them, to sell any part of the estate, real and personal, held by them for her separate use, for the purpose of changing the investment thereof, it shall be lawful for the said named trustees or the survivors or survivor of them to sell the same for such purpose only, and to transfer and convey the absolute estate in fee therein, to the purchaser thereof; to receive the proceeds of any and every such sale of the purchaser, who shall not be required to see to the application thereof; and to invest the same in such manner as the said Eliza W. Patterson may require; and such new investment shall be held by the said trustees for the same use, trusts and purposes, and with the same powers and authority of sale and reinvestment as is herein declared of and concerning the original trust, subject and separate estate.

"And after the death of the said Eliza W. Patterson the said named trustees and their successors shall hold the said trust, subject and separate estate—original and subsequently acquired by sale and reinvestment—for the use and benefit of any child, or children, of the said Eliza W. Patterson, and the issue of any child or children of the said Eliza who may die leaving issue in the lifetime of the said Eliza, and such issue shall take the share or portion of the said estate which their parent or parents would have taken had they survived the said Eliza. And if the said Eliza W. Patterson shall die without leaving a child or children, or issue of any child or children, living at the time of her death, the said trustees and their successors shall hold the said trust, subject and separate estate for my right heirs. And if it shall happen that either of the said trustees shall die, or become incapable of acting, or shall refuse to act in the execution of said trust, then and in every such case the continuing trustees or trustee shall from time to time nominate some other person or persons to be approved by the said Eliza W. Patterson to be trustee or trustees in the place and stead of the person or persons so dying, or becoming incapable or refusing to act, and shall convey and settle the said trust, subject and separate estate in such manner, that the same shall be legally vested in such continuing trustees or trnstee, and such person or persons so named and appointed to that office for the same uses, trusts and purposes, and with the same power and authority of administration, sale and reinvestment as is hereinbefore declared of and concerning the said trusts, subject and estate, and the said new trustee or trustees shall have the same power to act in the premises in conjunction with the continuing trustee or trustees, and as survivors of them, as if they had been originally named trustee or trustees in the premises in this my last will and testament.

"I do hereby nominate and appoint Carlisle P. Patterson, William H. Philip and W. S. Cox to be the executors of this my last will and testament."

In 1872 the trustees under Mrs. Pearson's will leased to the railroad company the land for five years, the lease containing a privilege to the railroad company to purchase such land during those five years on payment of $12,592. It also contained an agreement to renew the lease with

the same covenants and privileges for another term of five years, or until the lessors were prepared to convey the premises as agreed in the lease with a perfect title in fee simple.

From the time of the first lease in 1872, and under various leases thereafter, the company occupied the land, constructed part of its branch line thereon, and paid rent therefor up to 1888. On January 30 of that year a lease was made, which was signed by the trustees and by the president of the railroad company, though not by Mrs. Patterson. By the terms of that lease the premises were rented for five years from August 1, 1887, at the same rent and with the same covenants as to renewal and for the sale of the lands as contained in the first lease of 1872. The company continued in the occupation of the premises under this lease for the five years mentioned therein. Upon October 17, 1892, the company still being in occupation of the land, another instrument was executed in the form of a lease, signed by but one of the trustees, and purporting to lease the land for five years from August 1, 1892, at the same rental as the lease of 1888, and with the same covenants to sell at the same price ($12,592,) and to renew the lease for five years, as contained in the lease of 1888. This lease was signed by Winslow, alone, he then being one of the substituted trustees, but Jay, another of the substituted trustees, did not sign it, and, so far as appears, never saw it. These two substituted trustees had been duly appointed prior to or in the year 1883. The former trustee, Judge Cox, had resigned in June, 1892, and it does not appear that his successor had then been appointed.

The company retained possession of the property from August 1, 1892, up to August 1, 1897, and paid the amount of money mentioned in the paper of 1892, being at the same rate that had been paid since 1872, and as was provided in the lease of 1888. About the first of August, 1897, questions arose as to the terms of future occupation of the land. The trustees refused to execute any further lease, denied any obligation to renew it for any term, and said they preferred to sell, but refused to do so on the old terms, the land having in the meantime largely appreciated in value. In September, 1897, Mr. Winslow, in a letter to the company, said they were prepared to convey the property with a perfect title, and that they also preferred to execute such conveyance to any renewal of the lease. The company, however, prepared a lease, which provided for again leasing the land to it on the same terms for a period of five years, commencing on August 1, 1897, and this lease also contained a provision for a renewal for another five years, or until the lessors could convey the premises in fee simple to the company. This lease was never signed. Negotiations continued in regard to the matter, the company insisting it had the right to a renewal of the lease by virtue of the instrument dated August 1, 1892, while the trustees denied that contention, and though willing to sell, were not willing to do so at the price named in the former

lease, as they said that the value of the land had increased from $12,592 to over $30,000. During these negotiations and disputes the company retained possession of the land, and on or about February 1, 1898, (the dispute and the negotiations between the trustees and the company being still unsettled,) in accordance with the custom which it had followed during the running of the various instruments since 1872, of paying the rent semi-annually on the first days of February and August as it accrued, it sent the money that would have been due for rent, (if a lease were then in existence,) in the form of a money order payable to the order of Mr. Winslow, trustee of Eliza W. Patterson, and enclosed it in a letter addressed to Mr. Winslow, in care of Fisher & Co., agents, who sent it to Mrs. Patterson, as Mr. Winslow was then absent in Nicaragua as secretary of the Canal Commission. This money order was received by Mrs. Patterson, who thereupon wrote the following letter, under date of February 5, 1898, to one of the officers of the company:

"DEAR SIR: I returned to you a few days ago the draft which you sent me for the rent of my property on First street, Washington, by the railroad company of Balto. & Ohio of $377.77. The draft was made out to Mr. Francis Winslow, trustee, and I could not draw it, as Mr. Winslow is in Nicaragua, and I could not send it so far away to him, fearing it might be lost. I therefore return it to you, with the request that you would sign it, as you always have done heretofore, Cox, Jay & Winslow, trustees. Judge Cox & Mr. Jay are both here, so that they can sign it at once and I can have the money. By giving prompt attention to this small matter of business you will greatly oblige,

ELIZA W. PATTERSON."

The statement in this letter, that Judge Cox could sign the draft or order, was evidently a mistake, as his resignation had been accepted by the court years prior to the date of the letter.

The company afterwards sent back the draft, and, under some arrangement between Mrs. Patterson and Fisher & Co., which it does not appear was known by the trustees, but which was consented to by the company, the same was endorsed "Francis Winslow, trustee, by Thomas J. Fisher & Co., attorneys," and on such endorsement the money on the voucher was obtained from the company and received by Mrs. Patterson.

On August 1, 1898, the company sent a draft or money order for $377.77, the amount of rent which would have been due if there had been a valid lease in existence, the draft being sent to Mr. Winslow, trustee, which he declined to negotiate, and insisted that the rights of the company had been terminated by his notice prior to and in September, 1897, and that since that time the company had been occupying the property as tenants by sufferance.

This voucher, and those which succeeded it, and which were forwarded to Mr. Winslow, as trustee, and made payable to his order, were retained by him until January, 1900, when they were returned to the company

and a check given for the aggregate amount under an agreement that its acceptance should be without prejudice to the rights of the respective parties and their claims relating to the leasing of the land or the renewal of the lease, or to any question or matter connected therewith.

The dispute between the parties continued, as also did the negotiations in regard to a settlement thereof, until some time in March, 1900, when Mr. Winslow, Mr. Jay and the American Security and Trust Company, the substituted trustees took proceedings against the company before a justice of the peace to obtain possession of the premises, based upon a notice to quit, given under the statute. Judgment in favor of the trustees was rendered in that case by default, and an appeal by the company, as provided for by law, was prosecuted, and was undetermined at the time of the commencement of this suit. On August 15, 1900, the substituted trustees also commenced an action against the company for the use and occupation of the premises from August 1, 1897, to April 16, 1900, claiming $6,500, with interest from the last-named date. Soon thereafter the company commenced this suit asking for a judgment that the company was entitled to a lease from August 1, 1897, for five years, and also for a judgment for specific performance of the contract to sell, and obtained an injunction restraining the prosecution of both of the proceedings above mentioned.

The trial court held that there had been no valid contract for a sale, and that there was then no valid lease in existence such as was required to be proved before a court of equity would decree specific performance. The court expressed no opinion as to the effect of continued occupation after the expiration of any lease under the facts in the case with reference to the amount of the rental to be paid. That was a matter which it was held could be determined on the law side of the court. A decree was therefore entered dismissing the bill and dissolving the injunction which had been granted.

The Court of Appeals reversed the judgment of the trial court and remanded the case, and in its opinion it was stated as follows:

"In view of what has been said, we are of opinion that, under the provisions of the lease of 1892, executed by Francis Winslow, trustee, for and on behalf of the life tenant, Mrs. Eliza W. Patterson, the appellant was and is entitled to one renewal of such lease for the term of five years from and after the first day of Augnst, 1897, upon the terms and conditions of said lease as to the rents to be paid therefor, and that during the continuance of such term no suit for the dispossession of the appellant can be maintained. We are also of opinion that, for the time subsequent to the determination of said renewed lease for which the appellant shall require the use and occupation of said land, the appellant is entitled, and it is its duty to acquire the right to such use and occupation, under the exercise of the right of eminent domain conferred upon it by the act of Congress, by the ascertainment of the value of such use and

occupation, and payment to the owners of the land of the just compensation so to be ascertained, and the bill of complainant in this cause may be retained for the purpose of such ascertainment of value and just compensation. It follows that the decree of the Supreme Court of the District of Columbia, dissolving the injunction granted in this cause and dismissing the bill of complaint, must be reversed, with costs, and that the cause will be remanded to that court, with directions to vacate said decree, to restore the injunction and make the same perpetual, and for such further and other proceedings as may be just and proper, according to law and in conformity with this opinion, and it is so ordered."

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

It is quite plain that a lease containing a covenant to renew at its expiration with similar covenants, terms and conditions contained in the original lease is fully carried out by one renewal without the insertion of another covenant to renew. Otherwise a perpetuity is provided for. *Piggot* v. *Mason*, (1829) 1 Paige's Ch. 412; *Carr* v. *Ellison*, (1838) 20 Wend. 178; *Syms* v. *Mayor*, (1887) 105 N. Y. 153; *Cunningham* v. *Pattee*, (1868) 99 Mass. 248; Taylor's Landlord & Tenant, 8th ed. §§ 333, 334.

From the ordinary covenant to renew, a perpetuity will not be regarded as created. There must be some peculiar and plain language before it will be assumed that the parties intended to create it.

There is no question of the validity of the lease of 1888. It was for five years from the first of August of the year 1887, with a covenant of renewal, and that covenant would have been satisfied by giving a lease in 1892 for five years, up to August, 1897, without any covenant therein for a further renewal. In fact, however, the lease was not legally renewed in 1892, because the paper of that year was signed by one trustee only. In our opinion his signature did not make a valid lease. It required the signatures of all the trustees. A deed of land executed by one trustee does not convey his share as in the case of ordinary joint tenants. So where a deed of land was executed by two out of three trustees, the burden is upon the purchaser to prove the third trustee was dead. (1 Perry on Trusts, (2d ed.) sec. 411; 2 Id. secs. 499, 502; 2 Story Eq. Juris. (12th ed.) sec. 1280; *Brennan* v. *Willson*, 71 N. Y. 502–507.)

The authorities cited by the counsel for the company, to the effect that one of several trustees may, when so authorized by his associates, act with regard to the execution of some portions of the trust, as their agent, and that when not previously so authorized a subsequent ratification of his act by his associates may bind them all, do not embrace the facts in this case. There is no evidence of any authority to one trustee to sign a lease. The granting of a lease was an important and material act in the way of carrying out the trust under the will, requiring an exercise of the judgment

and discretion of all the trustees. It was therefore necessary for them all to act in order to make a valid instrument.

That one of several trustees can be entrusted by his associates with the transaction of the business of the trust may be, under certain circumstances, conceded, but those circumstances will not justify the doing of an act by one trustee on his own responsibility which is of a nature to require the deliberate discretion and judgment of all the trustees. In the case of a lease of property, such as is presented herein, the signatures of all are necessary to the validity of the paper.

The case cited of *Insurance Company* v. *Chase*, (5 Wall. 509,) relates to an insurance effected by one of several trustees, and the question was whether the policy covered the individual interest of the person taking out the insurance or his interest as a trustee; if the former, it was void because he had no interest as an individual, and the policy was therefore one in the nature of a wager. The court in the course of the opinion remarked:

"It is true that in the administration of the trust, where there is more than one trustee, all must concur, but the entire body can direct one of their number to transact business, which it may be inconvenient for the others to perform, and the acts of the one thus authorized are the acts of all, and binding on all. The trustee thus acting is to be considered the agent of all the trustees, and not as an individual trustee. If, within the scope of his agency, he procures an insurance, it is for the other trustees, as well as himself. If he does it without authority, still it is a valid contract, which the underwriter cannot dispute, if his co-trustees subsequently ratify it. In fact, so liberal is the rule on this subject, that where a part owner of property effects an insurance for himself and others, without previous authority, the act is sufficiently ratified, where suit is brought on the policy in their names."

The facts in this case do not bring it within the principle mentioned, and it is clear that to render the lease originally valid it must have been signed by all the trustees. Without it the instrument as a lease for five years was void under the statute of frauds. (Comp. Stat. D. C. 231, sec. 4.)

It is contended that the act of one of the trustees in signing the lease was subsequently ratified by the other by a recognition of its existence by long continued silence, if not by an express ratification. But an express ratification would consist of the signature of the other trustee to the paper, and of that there is no pretense. A ratification of an invalid instrument of this nature by recognition, we do not understand. The instrument was void under the statute of frauds, because of the lack of those signatures which could alone render it valid as a lease for five years. Recognition could not take the place of the absent signature. Whether the conduct of the trustees, or of Mrs. Patterson, amounted to such a part performance of an invalid contract as would take the place of the otherwise necessary signatures is another question. It is difficult to see how there could be

any technical ratification of this instrument without a signing thereof by the other trustee.

But assuming that something in the nature of a ratification might be based upon subsequent recognition, yet such recognition or ratification must be shown to have been founded upon a full knowledge of all the facts. There is no evidence of that kind in the case; none that the other trustee even knew of the existence either of the written paper of 1892 or that it contained a covenant to renew at all for any time. The possession by the company and the payment of rent were provided for by the covenant to renew contained in the lease of 1888, and hence there was a justification for that possession and for the payment of the money, which was entirely compatible with the non-existence of any written lease from 1892, or of any covenant to again renew for five years from August 1, 1897. This possession and payment cannot therefore be used as a basis for the presumption of knowledge on the part of the trustee of the existence of the so-called lease of 1892 or of the covenant contained therein.

Regarding the asserted part performance of the alleged contract of lease in 1892, or of the covenant contained in that lease, we think there was none such as to justify the contention that the covenant to renew in 1897 for five years was thereby so far rendered valid as to call for its recognition and enforcement. In this case there was reason, as we have said, without reference to any assumed part performance of, and aside from the alleged covenants in the paper of 1892, for the possession by the company and for the taking of the rent of the land by the trustees up to 1897. This reason was based upon the obligation which existed under the valid lease of 1888. The remaining in possession from 1892 to 1897 and the payment of the money need not, therefore, be referred to as a part performance of the invalid contract of lease and renewal contained in the paper of 1892. Without any reference to any paper of that character, possession and payment of rent were proper and amounted to nothing more than an acknowledgment of the obligations provided for in the before mentioned lease of 1888.

Acts of part performance which will take a case out of the statute must be referable solely to the contract. (*Williams* v. *Morris*, 95 U. S. 444, 457; *Phillips* v. *Thompson*, 1 Johns. Chy. 131; *Byrne* v. *Romaine*, 2 Edwards Chy. 445; *Jervis* v. *Smith*, Hoff. Chy. 470; *Lord* v. *Underdunck*, 1 Sand. Chy. 46; *Wolfe* v. *Frost*, 4 Id. 72.)

And again, specific performance of a void contract will not be decreed because of part performance, unless fraud and injustice would be done if the contract were held inoperative. (*Purcell* v. *St. Minor*, 4 Wall. 513; *Williams* v. *Morris*, 95 U. S. 444.) Such would not be the result here.

Nor can the receipt of rent in February, 1898, by Mrs. Patterson, under the circumstances detailed in the foregoing statement of facts, amount to such part performance of the invalid covenant to renew as to

authorize its enforcement. Neither trustee received the rent. The signing of the name of Mr. Winslow, one of the trustees, on the back of the draft from the company in February, 1898, was without the knowledge of or authority from such trustee, although the endorsement was made in perfect good faith by Fisher & Co., and the money was paid to and received by Mrs. Patterson. That signing was not a part performance of the contract of lease on the part of the trustees or either of them.

Mr. Winslow was at this time absent in Nicaragua. There is no proof in the case that Mrs. Patterson knew there was no valid covenant in existence for the granting of a further five-year lease from August 1, 1897. Her receipt of the money as beneficiary under the will of her mother would not bind the trustees to renew a lease under an invalid covenant to do so, or operate as a part performance of that invalid covenant. Especially would this be so where, as in this case, there had for months, or ever since August 1, 1897, been a substantial refusal by the trustees to renew on the old basis or to sell at the old price, and negotiations were still in progress between the trustees and the company relative to the terms of a continued occupation of the lands. The trustees and the company were alone the parties who could agree upon a lease, and while negotiations were pending on the subject, the receipt, unknown at the time to the trustees, of the money by Mrs. Patterson, as stated, could not be equivalent to a part performance by the trustees or either of them, of an alleged covenant to renew contained in the paper of 1892, the validity of which was at the same time denied.

Subsequently when drafts were received by the trustees they were not cashed, and when they were finally paid it was under a specific agreement that the payment should not in any way affect the situation between the parties. Hence the receipt of these drafts constituted no part performance upon which to base the recognition of the covenant to renew from August 1, 1897, which was repudiated as invalid by the trustees and which was in fact invalid.

Upon the question of the alleged contract to sell, after carefully examining all the facts, we agree with the Court of Appeals in holding that the company was not entitled to a decree for the specific performance of that alleged contract, and, therefore, specific relief of that nature should be denied. Under the terms of the will it is plain the trustees had no general and absolute power of sale, and the conditions upon which it could be exercised did not exist.

Regarding the other relief, we are of opinion that the portion of the injunction prohibiting the further prosecution of the trustees' action to recover the rental value of the land occupied by the company from August 1, 1897, up to the time mentioned in the complaint in that action, should be dissolved.

As to that part of the injunction which prohibits the further prosecution of the proceedings to recover the possession of the land there is more to be said. We agree with the Court of Appeals upon the subject of ousting the company from such possession. That court held that the evidence showed the company entered upon the use and occupation of the property in controversy with a view to its purchase when it could properly be effected. It was understood by all the parties what the character of the use and occupation of the land by the company was intended to be. Subsequently to its obtaining possession of the land in 1872 the railroad company constructed what is known as its Metropolitan branch, part of a highway between Washington city, the adjoining States and the West. This highway is not a merely private enterprise nor a matter of purely private concern. It is a public road, constructed for public purposes, under the sanction of the public authority, and over which the public have rights which cannot be permitted to be obstructed, much less destroyed, either by the company itself, to which the franchise has been granted as a public trust to construct and operate this road, or by antagonistic parties claiming the ownership of the land upon which it has been permitted to enter without previous payment therefor, or as the result of any private controversy between the railroad company and such parties. The company having entered by the license of the lessors, an action at law for the dispossession of the railroad company cannot be maintained if the company is willing to make compensation for its use and occupation of the land.

These views of the Court of Appeals we concur in, but we do not say that the company can take proceedings in this suit to condemn the land. The proceeding to condemn is otherwise provided for by law, and although the appellants contend that the company has no power under the law to do so, we are of opinion that by virtue of the various acts passed relative to the company, it has such power in this city with reference to this land. The court ought to keep in force for a reasonable time, say six months, that portion of the injunction prohibiting the trustees from continuing their proceeding to dispossess the company from the land, in order to enable it to condemn such land in proper proceedings for that purpose, which cannot be taken in the present suit. If more time is needed, the trial court may upon application, after notice, extend the time as to it may seem reasonably necessary. If no proceedings to condemn are taken within six months from the issuing of the mandate from this court to the court below, then the injunction should be wholly dissolved.

Our judgment, therefore, will be to reverse the judgment of the Court of Appeals of the District of Columbia, with directions to remand the case to the Supreme Court of the District, with directions to that court to

refuse specific performance of the alleged contract to sell the land, and to deny enforcement of any alleged covenant to lease the same from August 1, 1897, and also to dissolve that portion of the injunction enjoining the trustees from prosecuting their suit to recover the rental value of the land from August 1, 1897, and to retain that portion which enjoins further action on the part of the trustees to oust the company from the land, for six months from the date of the mandate of this court, and for further time, if the Supreme Court of the District shall be of opinion that it is proper. If no proceedings are taken to condemn the land within six months, then the injunction shall be dissolved. When the condemnation proceedings are concluded, or if not taken within the time stated, then, at the end of that time, application may be made to the trial court, and such judgment then entered as shall be consistent with this opinion, and with such provision in regard to costs incurred, subsequent to the mandate from this court, as shall to that court seem proper.

Reversed and remanded with directions to reverse the decree below and remand the case for further proceedings in conformity to this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.